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# PREVENTION OF DISCRIMINATION AND PROTECTION OF INDIGENOUS PEOPLES AND MINORITIES

## The concept and practice of affirmative action

**Progress report submitted by Mr. Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5**

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## Introduction

1. In its resolution 1998/5, the Sub-Commission decided, since the subject required careful and comprehensive inquiry, to appoint Marc Bossuyt as Special Rapporteur with the task of preparing a study on the concept of affirmative action, and authorized him to request the United Nations High Commissioner for Human Rights to send out a questionnaire to Governments, international organizations and non-governmental organizations inviting them to send all relevant national documentation on affirmative action.

2. In its decision 1999/106, the Sub-Commission renewed its authorization to the Special Rapporteur to make that request. The questionnaire was sent to Governments, international organizations and non-governmental organizations.

3. The present report is submitted in accordance with Sub-Commission decision 2000/104, in which the Sub-Commission, recalling Economic and Social Council decision 1999/253, expressed its appreciation to the Special Rapporteur for his preliminary report (E/CN.4/Sub.2/2000/11 and Corr.1) and decided to request the Secretary-General to remind Governments, international organizations and non-governmental organizations that had received the questionnaire to submit their responses. In that regard, the Special Rapporteur would like to express his deep gratitude to the Governments of Bolivia, Colombia, Greece, Guatemala, Israel, the Libyan Arab Jamahiryia, Pakistan, Paraguay, the Slovak Republic, Spain, Thailand, Trinidad and Tobago, and the United Republic of Tanzania, as well as to the International Labour Office and the Universal Postal Union, for their substantive replies to the questionnaire. Before using these contributions, the Special Rapporteur would prefer to receive more replies so that his next report would be based on the widest possible information. He therefore encourages Governments, international organizations and non-governmental organizations which have not done so to answer the questionnaire. The questionnaire is attached to the present report for ease of reference.

4. In the previous, preliminary report, two limits set by international law with respect to affirmative action were pointed out: (a) affirmative action may not lead to discrimination and (b) affirmative action has to be of limited duration.

5. This progress report will focus mainly on who is to benefit from affirmative action (the target group), what the justifications are for affirmative action and the forms affirmative action can take.

## I. THE CONCEPT OF AFFIRMATIVE ACTION

6. "Affirmative action" is a term used frequently but, unfortunately, not always with the same meaning. While in the minds of some the concept of "affirmative action" is also covered by the term "positive discrimination", it is of the utmost importance to stress that the latter term makes no sense. In accordance with the now general practice of using the term "discrimination" exclusively to designate "arbitrary distinctions", the term "positive discrimination" is a contradictio in terminis: either the distinction in question is justified and legitimate, because not arbitrary, and cannot be called "discrimination", or the distinction in question is unjustified or illegitimate, because arbitrary, and should not be labelled "positive". On the contrary, the term

"positive action", a term more often used in the United Kingdom, is equivalent to the term "affirmative action". In many other countries, such action is known as "preferential policies", "reservations", "compensatory or distributive justice", "preferential treatment", etc.

7. As a legal concept, "affirmative action" takes a place in both international and in national law. However, it is a concept without a generally accepted legal definition. Any serious discussion on the concept of affirmative action requires, however, as a prerequisite, a working definition:

> "Affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality."

8. Policies of affirmative action can be carried out by different actors belonging to the public sector, such as the federal Government or State and local governments, and to the private sector, such as employers or educational institutions.

9. In some countries, these affirmative action policies are voluntary and encouraged; in other countries, they are compulsory and failure to fulfil this obligation is sanctioned. The policies are not limited to employment and education: they can also be extended to housing, transportation, the ballot box, training, appointments to political, executive and judicial posts, the award of contracts or scholarships, etc.

## II. TARGET GROUPS: ISSUES OF OVER- AND UNDER-INCLUSIVENESS

10. Affirmative action is always directed to a certain target group composed of individuals who all have a characteristic in common on which their membership in that group is based and who find themselves in a disadvantaged position. Although this characteristic is often innate and inalienable, such as gender, the colour of their skin, nationality or membership of an ethnic, religious or linguistic minority, it does not necessarily always have to be so. As such, past and present affirmative action programmes have been concerned with women, blacks, immigrants, poor people, disabled persons, veterans, indigenous peoples, other racial groups, specific minorities, etc.

11. A crucial question, and one which will induce much disagreement, will be how to decide which groups are sufficiently disadvantaged to deserve special treatment. Although some international instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women are particularly relevant, it will often be national legislation that identifies who may benefit from affirmative action provisions.[1]

12. Affirmative action often arises from the confluence of two factors: (i) the existence of a persistent status of inequality, which is not always recognized as such, and (ii) the effective articulation of a legal right to relief by representatives of the underprivileged group.[2] Often, groups will lack the political strength and support to have themselves acknowledged as disadvantaged.[3] This results in under-inclusiveness of affirmative action programmes.

13. The reverse can happen too. Groups may be classified as disadvantaged, even if they do not want to be regarded as such because of fear of stigmatization or because they are not in favour of affirmative action. Therefore, consent of the members of the target group is crucial.

14. National legislation usually starts with an affirmative action policy that is aimed at a particular disadvantaged group. Yet, the policies are often expanded to other groups. This raises the issue of over-inclusiveness, because sometimes membership in certain groups defined by race, ethnic background or gender is used as a proxy for disadvantage. The genuineness of the relationship between affirmative action and compensation for past or societal discrimination depends on the extent to which race, ethnic background or gender is indeed an indicator of the social evil which the affirmative action programme is intended to remove and the extent to which taking race, ethnic background or gender into account is an appropriate method of combating discrimination. It can occur that affirmative action will benefit some people even though they themselves have not been disadvantaged by past or societal discrimination.[4] Especially in the United States, this has provoked some discussion.[5] Whereas affirmative action was originally aimed at African Americans, these efforts were, over time, also directed to redress the inequality of other deprived groups, most of them immigrants.[6] The question arose of whether these immigrants, who came voluntarily to the United States, deserved the same protection as African Americans, who were forced into slavery.[7] In essence, the protected groups in the United States comprise a range of individuals who have different legal bases for claims for redress: descendants of free immigrants, of conquered peoples and of slaves.

15. Another issue is the two-class theory, which raises the question of who truly benefits from preferential policies. It appears that it is the most fortunate segment of the groups designated as beneficiaries who seem to get the most out of affirmative action measures. For instance, affirmative action aimed at women will often benefit more white middle-class women than lower-class women of another ethnicity. Or, when affirmative action benefits a broad category, such as Hispanics or Asian Americans, some ethnic groups within those categories will obtain more advantage than others, because they are already high ranking in economic, educational and occupational status. In other words, beneficiaries of affirmative action programmes tend to be the wealthier and least-deprived members of a group.

16. This two-class theory may result in the creation of yet another "disadvantaged" or "discriminated against" minority within the majority. It is likely that affirmative preference programmes create new disadvantaged groups. Indeed, the majority members who miss out on a desired social good as a consequence of an affirmative preference programme are likely to come from the bottom of the white or male distribution, whereas the minority members who benefit from such programmes are likely to come from the top of the minority or female distribution.[8] Thus affirmative preference may well shift the social burden from one group to another.

17. It may be rather complex to establish whether or not an individual belongs to the target group. For example, how "black" does someone have to be to qualify as "black" in order to be entitled to benefit from affirmative action schemes? As far as immigrants are concerned, it is not always clear which persons still qualify as immigrants when they are second, third or fourth generation immigrants? What about children of mixed marriages? Moreover, there are already cases of individuals or entire groups who redefine themselves and who claim some status in order to benefit from the affirmative action measures.[9]

18. Some favour the creation of a new law on personal ethnic and racial status to define those who are eligible for these benefits. Others state that the self-perception of the group and the perception of the wider community in the midst of which the group exists are decisive. Naturally, this perception can change with the passage of time. In this context, General Recommendation VIII of the Committee on the Elimination of Racial Discrimination concerning the interpretation and application of article 1, paragraphs 1 and 4 of the International Convention on the Elimination of Racial Discrimination is particularly interesting.[10] After considering information in States parties' reports concerning the ways in which individuals are identified as being members of a particular racial or ethnic group, the Committee stated that such identification should, if no justification existed to the contrary, be based upon self-identification by the individual concerned.

19. It is clear that selecting and defining the target groups for affirmative action programmes present a major problem. This illustrates the importance of not basing affirmative action solely on group membership, but of taking other factors, such as socio-economic factors, into account to verify if someone qualifies for affirmative action. This means a more individualized approach towards affirmative action, awarding opportunities to an individual on the basis of individual needs, rather than only on the basis of group membership.[11]

## III. ASSESSING THE JUSTIFICATION OF AFFIRMATIVE ACTION

20. When introducing an affirmative action policy, States will try to justify it vis-à-vis public opinion. The grounds given as justification will mainly depend on the specific social context of the State in question. Some of the most common justification grounds will be discussed below, as well as the counter-arguments made against them.[12]

### A. To remedy or redress historical injustices

21. The aim is to compensate for intentional or specific discrimination in the past that still has repercussions today. Certain disadvantaged groups have been subjected to discrimination for long periods, which has put their descendants in an underprivileged position because of, for instance, poor education and training. Chibundu argues that affirmative action would here be corrective, restoring the group to the position it would have occupied but for the past injustice. Yet, he goes on to say, rarely can a mathematically precise causal relationship be conclusively demonstrated between a past wrong and current under-representation.[13] Nonetheless, where some degree of causal relationship between past wrongdoing and present under-representation can be shown, affirmative action can be applied, although its direct and specific beneficiaries need not be identical to the actual victims of the past discrimination.[14]

22. This justification was and is mainly used in the United States to support the public policies intended to "overcome the present effects of past racial discrimination" against African Americans. United States affirmative action programmes originated in Executive Order 10925 of President John F. Kennedy in 1961 and Executive Order 11426 signed by President Lyndon Johnson in 1965.[15] As such, the United States Commission on Civil Rights maintained: "Affirmative action encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to

prevent discrimination from recurring in the future".[16] The same rationale is, for instance, used by the Government of Australia in its affirmative action policy towards Australian Aboriginals.

23. However, opponents argue that there might be a dispute about whether the problem of disadvantage is one of current discrimination or the lingering effect of past discrimination. Although it is tempting to imagine that the contemporary troubles of historically wronged groups are due to those wrongs, Sowell believes that this is confusing causation with morality. He maintains that the contemporary socio-economic position of groups in a given society often bears no relationship to the historic wrongs they have suffered.[17] It cannot be denied that it will be very difficult for affirmative action programmes to meet the test of proximity in causation, and the cost of establishing such proximate cause may well exhaust the benefit that might arguably ensue.[18] This will be more difficult in a legal system that treats claims as individual rather than collective, making it hard to demonstrate the connection between past wrongdoing and present entitlement. Moreover, who is to determine the proper compensation? And how far back in time does one have to go? All this calls into question the desirability of backward-looking policies.

24. Yet, Chibundu contends, the fact that that a fit between past wrongs and present needs cannot be readily established argues not against affirmative action, but against the justification for it. A forward-looking justification - one that anchors for example the claims of African Americans for redistributive justice not on the past, but on the pragmatic needs of the present and the aspirations of the future - would impose less strain on the acceptance of affirmative action.[19]

### B. To remedy social/structural discrimination

25. The fact that disparities continue to exist in educational, social, economic and other status, indicates that the granting of equality for all before the law establishes formal equality but is insufficient to address adequately practices in society that lead to structural discrimination. In essence, the notion of structural discrimination encompasses all kinds of measures, procedures, actions or legal provisions which are, at face value, neutral as regards race, sex, ethnicity, etc., but which adversely affect disadvantaged groups disproportionately without any objective justification. This form of discrimination can occur in two ways: one can deliberately conceal one's intentions behind objective criteria; or one can very well act in good faith when requiring certain job skills. Nevertheless, both practices result in indirect or covert discrimination. For example, a minimum height requirement may disproportionately disadvantage women and Asians, and may be an unjustifiable job requirement, when there is no objective need for it, as can be physical tests or writing tests. Such discrimination is not always detectable on the surface. The traditional concept of non-discrimination principle only takes a neutral stance, i.e. that of de facto equality, and redresses only express or direct discrimination.[20]

26. Opponents dispute whether the problem is one of structural discrimination at all, or instead is due to a combination of other factors. When a social problem is deep-seeded, neither the non-discrimination principle nor affirmative action will help integrate disadvantaged groups. For instance, large-scale inequalities in access to and especially in the quality of education can induce a widespread inability to compete effectively for employment. Complementary

interventions, such as poverty programmes, will be needed to overcome other dimensions of the social problem. The State is then compelled to redistribute resources to enforcement, remedial and broader-based interventions in order to ensure access to quality education, for example.

27. In the proponents' view, this distributive justice argument is in itself a form of affirmative action, as resources will be assigned for the benefit of a certain group to ensure that this group will enjoy equality in fact. Redistribution is then a political arrangement benefiting disadvantaged groups. Moreover, it cannot be said to entail discrimination, as the economic burden of the redistribution of resources is placed upon the society as a whole.

### C. To create diversity or proportional group representation

28. Recently, American critical race theorists and other scholars have set out another theoretical basis for affirmative action, namely that the presence of racial and ethnic diversity within the academy and workplace is a necessary component of a just society.[21] In fact, they maintain that a racially and ethnically diverse environment reflects the larger society and promotes a more representative and enriched sense of community. "Positive diversity" seems to them a better approach to achieving compensatory justice for racial and ethnic minorities, and they therefore argue that diversity as a rationale for racial preferences needs to be separated from affirmative action.

29. The notion of diversity as a justification for racial preferences in the context of higher education first appeared in DeFunis v. Odegaard (416 U.S. 312, 1974).[22] In his dissenting opinion, Justice Douglas wrote that it seemed apparent to him that the Supreme Court jurisprudence weighed against the use of racial preferences for remedial purposes, unless "cultural standards of a diverse rather than a homogenous society are taken into account". This diversity rationale was later on applied in Regents of the University v. Bakke (483 U.S. 265, 1978). Justice Powell, writing for the majority, reasoned that race could be used as one of many factors when making admission decisions. The permissible goal was the university's interest in a diverse student body. Academic freedom was felt to include the right to select students, such as that different students could bring diverse backgrounds to the campus and that the educational experience could be enriched for everyone.[23]

30. In the same vein, Australia's Civil Service Reform Act of 1978 declares that its purpose is to produce "a work force reflective of the Nation's diversity", meaning proportional group representation.[24]

### D. Social utility arguments[25]

31. Proponents of affirmative action often point to the many social goals such a policy would likely serve. A well-designed policy of affirmative action would increase the well-being of many people in different ways.

32. Affirmative action might result in better service to disadvantaged groups, in the sense that professionals from a disadvantaged group have a better understanding and knowledge of problems affecting disadvantaged groups. Furthermore, when members of disadvantaged groups occupy positions of power and influence, the interests of all disadvantaged groups will be better

perceived and protected. Fair and visible representation of these disadvantaged groups in various fields, such as employment or education, would provide for better social and political effectiveness in these fields.

33. Another argument is that affirmative action can provide disadvantaged communities with role models which can give them important incentive and motivation. Moreover, the greater participation of members of disadvantaged groups in different social environments will destroy vicious stereotyping and prejudices still exercising a tenacious hold in many societies.

34. However, there are also counter-arguments. Alongside more theoretical questions, such as how social well-being is to be defined, there are more practical questions. Many argue that this kind of affirmative action brings with it risks to quality. Giving preference to less-qualified persons, solely on the basis of group membership, risks reinforcing stereotyping, instead of achieving the opposite, because of, for example, reduced efficiency in industry and education caused by the lowering of qualification standards. It may actually perpetuate thinking along racial lines.

### E. To pre-empt social unrest

35. It may not be ignored that affirmative action programmes ranging from special programmes for disadvantaged areas and gender preference programmes of the European Union to regional quota programmes of India and Nigeria, are being actively used both to promote the interests of underprivileged members of society and to balance internal inequalities of economic and political power, with the hope of pre-empting social unrest.[26]

36. During the 1960s, the United States was confronted with various racial riots, which came as a complete surprise to many Americans, not only because the riots mostly took place in northern cities, but also because they happened after the Civil Rights Act and the Voting Rights Act came into power, in 1964 and 1965 respectively. It had finally been forbidden to make any distinction on the basis of race in United States society and the black community had been given the right to vote; but this was still not sufficient for many militant black leaders. Following the very bloody and violent riots in Watts in 1965, the situation was seen as sufficiently threatening by United States politicians for them to take action. Both President John Kennedy and President Lyndon Johnson understood that race relations in the United States had never been so critical. Besides the establishment of poverty programmes, such as President Johnson's famous "War on poverty", an attempt was made to reduce black unemployment through strong affirmative action programmes, such as controversial quotas. According to President Johnson: "You can put these people to work and you won't have a revolution because they've been left out. If they're working, they won't be throwing bombs in your homes and plants. Keep them busy and they won't have time to burn your cars."[27]

37. Yet, Sowell rejects the belief that an even distribution of groups across sectors of the economy tends to reduce social frictions and hostility. He claims that history suggests the opposite and that such policies may even risk being counterproductive.[28] This cautionary note is illustrated by the experiences of Malaysia.

38. Around 1969, it became clear in Malaysia, that only a small group of the ruling elite had benefited from affirmative action schemes, while the overall economic position of the Malays was adverse. Various grave racial riots broke out, the Parliament was suspended and Malaysia was ruled until 1971 by the National Operations Council (NOC). In 1971 the Constitution Amendment Act was passed. It permanently removed from legal public debate certain "sensitive" issues, such as language, citizenship and the special position of the Malays, by entrenching these issues in the articles of the Constitution and by amending the 1948 Sedition Act so that it is now seditious, even in Parliament, to question the principle underlying these "sensitive" issues. It became an offence even to discuss article 153 of the Constitution (see para. 41 below) and the affirmative action provisions accorded to Malays. The purpose of these amendments, which are still upheld by the courts, was "to avoid the racial politicking that had contributed to the race riots".[29]

### F. Better efficiency of the socio-economic system

39. Some economics argue that the elimination of discrimination against disadvantaged groups will serve the efficiency and justice of the socio-economic system. The working of the labour market can be optimized if the present imperfections caused by irrational prejudices are corrected.[30] In the United States and Canada affirmative action is promoted as "good for business" and several companies have made "equal opportunity" a "business objective".[31] However, the fact should not be overlooked that financial benefits, such as tax reductions, compensation or government contracts, are often awarded to companies or institutions that apply affirmative action policies; or, on the other hand, that sanctions can be placed on companies or institutions that do not comply.[32]

### G. A means of nation building

40. At the dawn of a new State, efforts are made to create a more egalitarian society and a common nationality to strengthen its sovereignty. Many examples of such efforts have been given by States that gained their independence after a long period of colonization. These States found themselves divided in ethnic conflict or were aware of several groups that were lagging behind.

41. In 1957, the Constitutional Commission of Malaysia recognized the vulnerable position of Malays as opposed to non-Malays, such as Chinese and Indians, who wielded large economic power. Of interest is the Commission's account of the existence of affirmative action as a major part of colonial policy. As Philips notes, it is a good illustration of a situation where affirmative action was being utilized to compensate for a lack of development, rather than being used to remedy past discrimination.[33] The Constitutional Commission recommended that, because of the prevailing circumstances, it was necessary to continue the affirmative action measure: "The Malays would be at a serious disadvantage compared with other communities if they were suddenly withdrawn. But with the integration of the various communities into a common nationality, which we trust will gradually come about, the need for these preferences will gradually disappear". The Constitutional Commission modelled its recommendations on the affirmative action provisions of the Indian Constitution, and are now to be found in article 153 of the Federal Constitution of Malaysia. Its provisions mainly concern the reservation of permits

or licenses for the operation of any trade or business for Malays and natives of any of the states of Sabah and Sarawak and the reservation for them of places at any university, college or other educational institutions.

42. Philips explains his view as to why the non-Malays accepted the introduction of article 153. It took an informal "bargain" among the three main political parties. "The leaders of these three parties agreed that the Malays, as the indigenous race, should be recognized as primus inter pares and should assume major political control. In return, the non-Malays were promised that there would be no interference in their economic pursuits. In return for acceptance of Malay special rights, the non-Malays would be granted favourable revisions in citizenship regulations, including the granting of jus soli in the Federation after independence." It was agreed that the "special rights" provisions of article 153 would remain in place for a period of 15 years from the date of independence. However, the course of events and, in particular, the race riots of 1969 led to the removal of the 15-year time limit. Article 153 is now a permanent feature of the Constitution.

43. The Nigerian Constitution of 1979 imposes an obligation actively to encourage the national integration of the more than one hundred different ethnic groups. To ensure that there shall be no predominance of a few groups over all the others, a quota system operates which gives shares of government employment to citizens of the 21 states of the Federation. The Cabinet, for instance, must contain one person from each state and the army must reflect the federal character of Nigeria. These 21 states do not correspond with the various ethnic groups, as the aim was to replace ethnic loyalties by regional and political loyalties based on local power units.[34]

44. Since the historic elections of 1994, the Government of South Africa has found itself faced with enormous challenges. According to Andrews, "the new South African Government recognized that the euphoria of political transformation would be enormously deflated if the economic status quo were not modified. In brief, political rights had to lead to economic gains for a significant proportion of the population if the new democracy was to survive. Since post Cold War political realities put paid to any socialist aspirations, only certain limited options were possible in the new paradigm. One such option drawn from elsewhere was affirmative action."[35] Affirmative action in South Africa has been used differently than in other societies, where affirmative action was largely seen as a mechanism of redress applied to minorities. How to apply it then to a majority?[36]

45. Because of the legacy of apartheid, the accumulation of human capital in South Africa a precondition for successful economic development and growth, had been stifled. Therefore, socio-economic rights could not be ignored in the new Constitution and were included as fully justiciable in the Bill of Rights. It is within this context that affirmative action is located and is viewed as a transformational measure. Although there is a commitment in the Bill of Rights to non-racialism, in section 9 the need for affirmative action as an important element in the overall goal of political and economic reconstruction of the society is also recognized. Both in constitutional directives and in the Reconstruction and Development Programme (RDP), affirmative action becomes an integral part of the transformation project, not only concerning the political status quo but the socio-economic edifice as well. The RDP aims are to harness South Africa's human capital to transform the economy and the society.[37]

## IV. FORMS OF AFFIRMATIVE ACTION

46. The core problem of affirmative action will be the transformation of the above-aspired objectives into legally binding undertakings. Affirmative action is often treated under a generic heading, as though affirmative action measures are uniform. Yet, an ILO study by Hodges-Aeberhard and Raskin demonstrates that, in reality, the methods by which these objectives are operationalized may vary too: compliance with affirmative action legislation can be demonstrated by implementing a range of policies developed to suit a particular context.[38] Some forms of affirmative action will be more effective or appropriate to promote equality than others, depending on the particular context and the political choice that has been made. Moreover, as was pointed out in the preliminary report, affirmative action measures must always comply with the principle of non-discrimination.

### A. Affirmative mobilization

47. Through affirmative recruitment, the targeted groups are aggressively encouraged and sensitized to apply for a social good, such as a job or a place in an educational institution.[39] This can occur through announcements or other recruitment efforts, where it has been made sure that they actually reach the targeted groups. An example would be the setting up of job-training programmes to enable members of minorities to acquire the skills that would allow them to compete for jobs and promotion. The rationale is that equality in fact will not be achieved if the effects of discrimination have deprived people of the opportunities to acquire the skills that are necessary for competing effectively.[40] Affirmative recruitment would, therefore, through remedial interventions such as job training, out-reach and other skill-building or empowerment programmes, place those who have been disadvantaged in a condition of competitiveness. It can also mean seeking out and raising awareness among members of disadvantaged groups who might not know of benefits available to them in the field of housing or other social goods.

### 2. Affirmative fairness

48. Affirmative fairness means that there will be a meticulous examination to make sure that members of target groups have been treated fairly in the attribution of social goods, such as entering an educational institution, receiving a job or promotion. In other words, have they been judged on merit or has racism or sexism been a factor in the evaluation process? This can be ascertained by establishing effective and credible grievance or complaint procedures to handle allegations of discrimination, review procedures to double-check personnel actions, and examination of practices in an attempt to eliminate non-intentional discriminatory practices. All this is to ensure that the criteria used for hiring or promotion are validated for job-relatedness and did not serve as a mask for racial or gender discrimination. It means that, when it comes to how people are hired or promoted, decision-making has to be colour-blind, and people must be treated on the basis of their individual merits rather than on their status as a member of a particular group. It boils down to the idea that the "best qualified" ought always to be hired.

49. Affirmative mobilization and affirmative fairness both entail measures dedicated to overcoming the social problems of a target group, but the measures do not themselves entail discrimination against people who are not members of that group. Rather, they place the costs of affirmative action on the whole society. In that way, these measures are colour-blind, but when

it comes to the motivation of the measures or their strategic planning or monitoring, the approach is definitely race-conscious. It is probably for that reason, among others, that affirmative recruitment and affirmative fairness are well received and accepted.

### 3. Affirmative preference

50. Affirmative preference means that someone's gender or race will be taken into account in the granting or withholding of social goods. Affirmative preference measures can mean two things.

51. First, they can mean that when two equally qualified persons apply for a job, promotion, grant, etc., preference will be given to the person belonging to a designated group that is the beneficiary of affirmative action measures.

52. Second, they can also include other more radical measures.[41] It can take the form of prohibiting members of non-designated groups from applying for opportunities. Or, they can be allowed to compete, but even if they are better qualified, preference will still be given to designated groups. Members of designated groups can be automatically given additional points on competitive examinations, which is called "race-norming". Lower standards can be applied to them when evaluating their applications for university or employment. Informal percentages, guidelines, goals, quotas or reservations can be imposed that fix the proportions of social goods the designated groups must receive.[42]

53. Affirmative preference is the most controversial form of affirmative action. Opponents claim that a consequence of this sort of affirmative action is the decline of occupational and professional standards and that it can even lead to stigmatization. Moreover, it emphasizes group remedies as the best way to improve the situation of target groups. This group approach evokes widespread resistance. Entitlement to benefits solely on account of group membership, stresses once more the dilemma that exists, especially in liberal democratic States, of individual versus group rights.[43]

54. In the words of Glazer, "if the whole concept of legal rights has been developed in individual terms, how do we provide justice for the group? And if we provide justice for the group - let us say, a quota which determines that so many jobs must go to the members of the group - then do we not, by that token, deprive individuals of other groups, not included among the discriminated-against groups, of the right to be treated and considered as individuals, independently of group characteristics?"[44] He also believed that such affirmative action would permanently section a nation on the basis of group membership and identification. It confronts the formal arrangement of the individual rights regime by channelling remedies into group categories, thereby disrupting standard notions of individual equality.

55. Many find that this type of affirmative action constitutes discrimination, because it treats people as members of groups or categories without regard to individual merit.[45] Although persons have validly satisfied the criteria, they will be nonetheless denied what would otherwise be their just due. Discrimination takes place through the rationing of social goods, and, this will mean that some members of other groups will no longer be considered for these social goods

which are now only in limited supply. This places the costs of affirmative action on specific individuals. In essence, this kind of affirmative action inflicts an injury on members of group A in order to promote the welfare of members of group B.

56. It creates problems under human rights law, (a) because these injuries are usually imposed in areas of life such as health, education, labour, political participation that are protected by specific articles in the international treaties concerning human rights, and (b) because the criteria for imposing the harms (the basis for classifying people as A or B) are typically the very grounds that are expressly forbidden under non-discrimination provisions. It will thus be very difficult to reconcile demands of legal strategies sensitive to the problems of target groups with the seemingly contradictory demands of individual justice.

57. In the 1997 Report on the World Social Situation, it was maintained that Governments impose quotas or other hard preferences without first building consensus, thus alienating citizens who lose their right to compete on equal terms. Without consensus, quotas become extremely divisive. The Report blames Governments for finding hard preferences attractive because they do not require increased taxation or expenditure. It is much easier to impose quotas than to attack the underlying causes of de facto inequality between groups, including discrimination, poverty, poor education, malnutrition and geographical isolation, through redistribution of income.[46]

58. Some grounds for differences in treatment are recognized in international law as deserving the greatest degree of attention. Particularly classified as suspect, or the most likely to be unjustified, are distinctions based upon race, sex and religion.[47]

59. As such, Judge Tanaka stated in the South West Africa cases: "We consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law."[48] In its Advisory Opinion of 1971 on the Namibia case, the International Court of Justice stated: "To enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."[49]

60. In the same line, the European Commission of Human Rights found in East African Asians v. United Kingdom: "The Commission recalls that, as generally recognized, a special importance should be attached to discrimination based on race; that publicly to single out a group of persons for differential treatment on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question."[50]

61. The case law of the United States Supreme Court cannot be ignored in this respect.[51] Because of the legal uncertainties surrounding affirmative action and the inherent conflict between the affirmative action policy and the Constitutional provisions that adopt a colour-blind approach, the Supreme Court developed extensive case law. The starting point was Plessy v. Ferguson (163 U.S. 537), where, in 1896, the Supreme Court upheld the "separate but equal" doctrine. This was reversed in Brown v. Board of Education (374 U.S. 483) almost 60 years later when, in 1954, the Supreme Court decided that separate schools necessarily

created a feeling of inferiority. Already in 1944, the Supreme Court had decided in Korematsu v. United States that all legal restrictions which curtailed the civil rights of a single racial group were immediately suspect and had to be subjected to the most strict scrutiny.

62. In 1974, the Supreme Court was expected to rule for the first time on affirmative action measures concerning university admittance in DeFunis v. Odegaard (416 U.S. 312). However, as the white student who had been at first denied admittance to the Law Faculty of the University of Washington was only a few weeks from graduating, the case was not decided. In 1978, the justices were deeply divided in Regents of the University of California v. Bakke (438 U.S. 265): with a vote of five against four, it was ruled that, even in the case of an affirmative action programme, strict scrutiny had to be applied. The arguments made for the affirmative action programme had to be looked at, to see if any of them were "compelling" enough to meet the strict scrutiny test.

63. In the following years, the Supreme Court decided a number of cases where affirmative action was accepted, for example: Steelworkers v. Weber (443 U.S 193 (1979)); Fullilove v. Klutznick (448 U.S. 448 (1980)); Sheet Metal Workers v. EEOC (478 U.S. 421 (1986)); United States v. Paradise (480 U.S. 149 (1987)); Johnson v. Santa Clara County (480 U.S. 1442 (1987)); Metro Broadcasting Inc. v. FCC (497 U.S. 547 (1990)).

64. In Steelworkers, the Supreme Court accepted the affirmative action programme under which training posts were reserved for African American employees, because the programme was carried out by a private employer and aimed at job categories that had traditionally been segregated. In Sheet Metal Workers, Paradise and Johnson, all three affirmative action programmes were accepted, because their purpose was to remedy intentional discrimination practiced in the past against the African American population by the New York syndicate of metalworkers, the police corps of Alabama and against women in the "skilled craft" job category in Santa Clara county, in the respective cases.

65. Other programmes of affirmative action were struck down by the Supreme Court, as in: Firefighters v. Stotts, (467 U.S. 561 (1984)); Wygant v. Jackson Board of Education, (476 U.S. 267 (1986)); City of Richmond v. Croson (488 U.S. 469 (1989)).

66. The cases of Firefighters and Wygant both concerned the laying off of white workers with more seniority than their African American colleagues, in order to make room for the employment of women or minorities. These affirmative action measures did not stand up to the strict scrutiny test. In Croson, the affirmative action stipulated that 30 per cent of the city's contracts were to be set aside for minority-owned businesses. The Supreme Court deemed that this was not a narrowly tailored plan to overcome past racial discrimination.

67. In 1995, the Supreme Court took an important decision in Adarand Constructors v. Pena (115 St.Ct. 2097). It involved the Adarand Constructors Company, which had lost a contract to a Hispanic-owned construction company even though Adarand had been the lowest bidder, because a federal statute prescribed that 10 per cent of public works contracts were to be set aside for minorities. Writing for a majority of six, Justice O'Connor stipulated that even affirmative action plans created by the federal Government must meet the strict scrutiny test. A compelling purpose must be served and the plan must be narrowly tailored to meet that

compelling purpose. In the justice's view, the past Court decisions established three propositions concerning race-based programmes: (i) scepticism: preferences based on racial or ethnic criteria must necessarily receive a most searching examination; (ii) consistency: the standard of review should not depend on the particular race of the people either burdened or benefited by the plan; (iii) congruence: equal-protection analysis should be the same whether a state or the federal Government was involved.[52]

68. In Abdulaziz, Cabales and Balkandali, the European Court decided: "it can be said that the advancement of the equality of the sexes is today a very major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference in treatment on the ground of sex could be regarded as compatible with the Convention".[53] Yet, it would be wrong to conclude that those weighty reasons for justifying gender discrimination have always been consistently required.[54]

69. It is significant that, in its case law, the United States Supreme Court applies the lower standard of "intermediate scrutiny" to affirmative actions aimed at remedying gender discrimination. It was ruled that the Government could discriminate on the basis of sex if it had important objectives and the measures taken by the Government were substantially related to achieving those objectives. It was clear that "important" would be something less than "compelling" and that the measures would not have to be as "narrowly tailored" as required by the strict-scrutiny test.

70. European Community (EC) law, however, is particularly active in countering gender discrimination, acknowledging equal treatment between men and women as a fundamental right. EC law has recognized that to achieve equality of opportunity between women and men it is necessary to go beyond the eradication of discrimination and that affirmative action may be appropriate even where it results in the preferential treatment of the formerly disadvantaged group.[55] However, it was up to the Court of Justice to determine how far national affirmative action policies could go.[56]

71. In Kalanke v. Freie Hansestadt Bremen, the Court affirmed that article 2 (4) of the Equal Treatment Directive permits the enactment of measures which, although discriminatory in appearance, are designed to eliminate or reduce actual instances of inequality which may exist in the reality of social life, and hence improve women's ability to compete on the labour market and to pursue a career on an equal footing with men.[57] As a derogation from an individual right laid down in the Directive, that provision must be strictly interpreted: it could not therefore be understood as legitimizing national rules which guarantee women absolute and unconditional priority for appointment or promotion, since such measures go beyond the furtherance of equal opportunities and overstep the limits of article 2 (4). The City of Bremen operated a tiebreak provision, on finding that two candidates for a job possessed the same qualifications, gave automatic preference to the female candidate when there was under-representation of one sex. Under-representation of women was deemed to exist when women did not make up at least half of the staff in the individual pay bracket in the relevant personnel group in the department or at the function levels provided for in the organization chart. The provision was found to be incompatible with EC law, although the Court was explicit in the Kalanke case that positive

action could be used to improve the opportunities of women, having gradual and systematic effects, but it must not be used to achieve equality by bringing about immediate substantive equality.

72. In Marshall v. Land Nordrhein-Westfalen, the Court of Justice refined its case law.[58] It decided that, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, a national rule which requires that priority be given to the promotion of female candidates, unless reasons specific to an individual male candidate tilt the balance in his favour, is not precluded by the Equal Treatment Directive, provided that: (a) in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate; and (b) such criteria are not such as to discriminate against the female candidates. It seems that the so-called Öffnungsklausel, which does not give automatic preference to female candidates, but permits diversion from this preference when "reasons specific to an individual male candidate tilt the balance in his favour", made the difference in Kalanke.[59]

73. Whatever the case may be, it is clear from the international and national case law discussed above that the relationship between affirmative action and the non-discrimination principle is very stringent. The simple fact that a particular category of the population suffers from underprivileged economic or social conditions does not mean that, in order to upgrade its material position, any distinction based on a characteristic defining the group should be considered legitimate, even if the ground is irrelevant as a basis of distinction with regard to a particular right. It would be most unwarranted to award affirmative action measures to persons who in essence do not need them, but used to belong to a group which formerly was in a disadvantaged position, and to deny them to persons who do need them, but used to belong to a group who formerly held a well-to-do position in society.

74. Affirmative action must concentrate on taking measures which can be expected to fulfil the needs of persons belonging to a group requiring special protection. It is through the choice of measures and of the moment and place at which they will be activated that the State can give benefits to targeted groups, without thereby excluding from the benefits others who do not belong to these targeted groups. In no case may someone be robbed of his rights, including the right to equal protection of the law, with the excuse that this could help groups that were previously discriminated against.

75. Affirmative action policies are only admissible insofar as they do not contravene the principle of non-discrimination. This means that if a distinction is made, due attention should be given to the ground on which the distinction is based in deciding whether this distinction amounts to discrimination or not. However, it is not the ground itself that is decisive, but the connection between the ground and the right in which the distinction is practised. There has to be a sufficient connection between the right and the ground. The ground has to be deemed relevant for the specific right in which the distinction is based. The aim or goal pursued is not decisive. The judicial assessment of whether distinctions are arbitrary goes a step further than

assessment undertaken at a purely political level. Thus, affirmative action to ensure full equality is not always legitimate. Affirmative action should not be interpreted as justifying any distinction based on any ground with respect to any right merely because the object of the distinction is to improve the situation of disadvantaged individuals or groups. It is not the preference but the injury and the use of forbidden classifications as a basis for imposing the injury that are sanctioned. Affirmative action is no exception to the principle of non-discrimination. Rather, it is the principle of non-discrimination that establishes limits to each affirmative action.

### 4. Is affirmative action mandatory?

76. Some international doctrine and jurisprudence suggest that, when a State ratifies a human rights treaty, it agrees to take positive State action to "ensure" enjoyment of, or to take steps to achieve "full realization" of, the rights recognized in that treaty, as is the case with the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.[60]

77. The Human Rights Committee has made a number of statements in its General Comments with respect to the necessity of positive government action.[61] It has often remarked that this cannot be done by simply enacting law and has asked State parties to provide information in their subsequent reports concerning the measures they have taken or are taking to give effect to the precise and positive obligations under article 3 of the International Covenant on Civil and Political Rights.[62]

78. The Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights have both adopted several general recommendations which indicate their view that the respective Conventions impose positive state action for achieving equality.[63] However to state that international law impose a duty to take affirmative action is too extreme. What it does promote is the possibility of taking affirmative action to achieve de facto equality.

79. The Committee on the Elimination of Discrimination against Women reiterated the importance of this possibility in its General Recommendation No. 5:

> "Taking note ... that there is still a need for action to be taken to implement fully the convention by introducing measures to promote de facto equality between men and women ... Recommends that States parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment."[64]

80. The Human Rights Committee has interpreted the International Covenant on Civil and Political Rights as requiring affirmative action programmes in certain circumstances. In its General Comment on non-discrimination the Committee points out that: "... the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific

action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population".[65]

81. The Committee on Economic, Social and Cultural Rights has raised a number of questions concerning affirmative action, especially as regards people with physical disabilities and ethnic or racial minorities, and in doing so, Craven maintains, it seems to accept the legitimacy of affirmative action. However, it still has not explicitly recognized the obligatory nature of affirmative action.[66]

82. Yet, some commentators have argued that States are indeed obliged to take affirmative action for the benefit of disadvantaged groups.[67] They base their arguments on the theory of "effet utile". The rights contained in the human rights treaties have to be given appropriate and full effect, and in some cases affirmative action is the most appropriate technique to ensure this.[68] Those commentators also base themselves on case law developed by the European Court of Human Rights, which has found that in some circumstances passivity on the part of the State will not be sufficient, but there will be positive obligations inherent in an effective respect for the rights inscribed in the Convention. The Marckx case, especially, seems to strengthen them in their belief that positive State action, and in certain cases affirmative action, is sometimes required of the State in order for it to fulfil its duty to respect equality.[69]

### 5. Equality of opportunities versus equality of results

83. It is clear that the main goal of affirmative action is to establish a more egalitarian society. However, there are many competing and conflicting ideals of equality. Equality itself is essentially an undetermined category that is often filled in by policy makers.

84. Two ideals of equality that are particularly relevant to affirmative action are equality of opportunity and equality of results. The choice of an ideal will also determine which affirmative action programmes are desired or favoured and which vision of social justice society wants to implement.[70]

85. Equality of opportunity is consistent with the view that the aim of anti-discrimination law is to secure the reduction of discrimination by eliminating/cleansing from the decision-making processes illegitimate considerations based on race, gender or ethnicity which have harmful consequences for individuals. It is not concerned with the result, except as an indicator of a flawed process. This approach is also markedly individualistic, concentrating on securing fairness for the individual. It comes from a liberal vision of society, reflecting respect for efficiency, merit and achievement.

86. This view of equality is seen as "manageable" in that its aim can be stated with some degree of certainty. For example, in an employment context, it means that individuals are entitled to compete for jobs exclusively on the basis of characteristics needed for the satisfactory performance of those jobs. The proposition is that racial, sexual and ethnic characteristics are irrelevant to the way people should be treated. Thus persons should be selected and recruited without regard to race, gender, ethnic background, etc. Equality of opportunity promotes freedom of choice and free competition between individuals. Therefore, it allows social

mobility, up or down, in accordance with people's individual talents and skills. The affirmative action measures that will be consistent with the ideal of equality of opportunity, will, not surprisingly, involve measures aimed at skill-building and gender- and colour-blind decision-making (affirmative recruitment and affirmative preference).

87. However, although equality of opportunity will bring everyone to the same starting line, it has been criticized as deeply flawed. This approach is said to misconceive the deep structure of discrimination. More precisely, affirmative recruitment and affirmative preference, also called soft affirmative action, will require a comparatively long time to produce a social order free of traces of past or structural discrimination.[71] Race and sex discrimination are as often institutional as individual and the problem is misconceived as being one of intention rather than effect. It does not take adequately into account the surrounding and reinforcing nature of racial or gender disadvantage, and concentrates only on particular action in assessing whether there should be legal intervention, ignoring the wider picture.

88. Critics of equality of opportunity find that the aim should be to fix the outcomes of the decision-making processes. They argue that the basic aim is the improvement of the relative position of disadvantaged groups. This approach tends to be concerned with the relative position of groups or classes, rather than individuals. Equality cannot depend on individual performance.

89. Where equality of opportunity maintains that talents and skills are not distributed uniformly throughout the human race, equality of results states paramountly that skills and talents are distributed uniformly. Men, women, whites and ethnic minorities have on average the same talents and skills. Thus, implementing the ideal of equality of opportunity would be expected to result in equal outcomes, in the sense that men, women, whites and ethnic minorities would be represented in positions of influence and power in proportion to their total strength in society. Following that reasoning, this means that any large disparities in result must therefore necessarily be due to the existence of a system or structure of discrimination which is the result of certain practices.

90. Affirmative action consistent with the ideal of equality of results will here imply measures of affirmative preference, and, more specifically, hard affirmative action measures, such as quotas, reservations, goals, etc. The achievement of equality of results requires measures that lead inevitably to proportional representation of groups in, for example, the workforce, education and public housing. Social goods are distributed precisely on the basis of race, gender, ethnic background, etc. Some proponents also point out that affirmative action has to be seen in the context of economic, social and cultural rights, which implies political State action which is aimed at adopting special measures to improve the situation of socio-legal categories in certain domains.[72]

91. The ideal of equality of results is more controversial because of its methods, which are open-ended and unmanageable, such as the adoption of quotas. Quotas are often criticized for serving to disadvantage other vulnerable groups that have similar claims to equality, for contributing to hostility and resentment between social groups and for failing to take into account the fundamental element of individual choice. This results in the displacement or rejection of those who, under traditional criteria, would have been allocated a social good.

92. But should individuals be asked to make sacrifices to compensate some members of target groups? As stated before, reverse discrimination is absolutely to be avoided. As McCrudden points out, this approach is said to take insufficient account of the extent to which the burden of helping disadvantaged groups falls on third parties who may be "innocent" of past wrong-doing, who may have gained no benefit from discrimination against these groups in the past and who comprise some of the least advantaged sections of the community in terms of their economic circumstances.[73]

93. It is interesting to note that most countries started out with an affirmative action programme consistent with the ideal of equality of opportunity. However, this ideal was gradually replaced by that of equality of results, under pressure of political or social motives.[74] Often, the two ideals are confused, and the legislation does not make clear which ideal of equality it wants to see implemented.

94. Nevertheless, it is clear that the issue is not simply whether one is for or against affirmative action for a particular group. The method by which the betterment of their position is attempted matters greatly in terms of whether such efforts have the support or the opposition of others.[75] A last remark: affirmative action programmes do not substitute for anti-poverty programmes. Nor do they substitute for laws against discrimination, for they provide no benefits for groups such as Chinese or Jewish minorities, which suffer discrimination in many countries but are not, on average, disadvantaged.[76]

## Notes

[1] For instance, in the United States the "protected" groups that were to benefit from affirmative action were identified as follows: American Indians or Alaskan Natives: persons having origins in any of the original people of North America and who maintain cultural identification through tribal affiliation or community recognition; Asian or Pacific Islanders: persons having origins in any of the original peoples of the Far East, South-East Asia, South Asia or the Pacific Islands; Blacks: persons having origins in any of the black racial groups of Africa; Hispanics: persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race. In South Africa, the designated groups are Black people (African people), people classified as "Coloureds" and Indian South Africans, women and people with disabilities. For more on the question of racial identity in South Africa, see P.E. Andrews, "Affirmative action in South Africa: transformation or tokenism", Law in Context, 1999, pp. 91-93.

[2] See M.O. Chibundu, "Affirmative action and international law", Law in Context, 1999, p. 21.

[3] In India, the Scheduled Castes and Tribes, which account for 20 per cent of the entire Indian population, are given special rights. Another group, the so-called socially and educationally backward classes, also benefits from affirmative action measures. Unlike the Scheduled Castes and Tribes, they have never been a clearly defined category. Their identity, therefore, is strongly disputed and thus frequently subject to review. Several groups have tried to qualify for these rights, to the point where two national Backward Classes Commissions were set up, in 1953 and 1979 respectively. They had a mandate to draft lists of groups to be considered for affirmative action. Although India inscribed affirmative action in its Constitution with the

purpose of eliminating the caste system, affirmative action for backward classes has actually provided for a revival of the caste system. In the end, the lists are nothing more than a continuous selection of castes, only limited by a decision of an Indian state court that backward classes cannot include more than 50 per cent of the population. See F. de Zwart, "Positieve discriminatie and identiteitpolitiek in India: grenzen aan sociale constructies", Tijdschrift voor beleid, politiek en maatschappij, 199, No. 4, pp. 262-274; W.F. Menski, "The Indian experience and its lessons for Britain", in B. Hepple and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, pp. 300-343; O. Mendelsohn, "Compensatory discrimination and India's untouchables", Law in Context, 1999, vol. 15, No. 4, pp. 51-79; D.W. Jackson, "Affirmative action in comparative perspective: India and the United States", in T. Loenen and P.R. Rodrigues, Non-discrimination Laws: Comparative Perspectives, The Hague, Kluwer Law International, 1999, pp. 249-263.

[4] G. Moens, Affirmative Action, the New Discrimination, Sydney, The Centre for Independent Studies, 1985, pp. 81-82.

[5] L. Newton, "Reverse discrimination as unjustified", International Journal of Ethics, 1973, vol. 83, pp. 311-312.

[6] See C. Hamilton, "Affirmative action and the clash of experimental realities", The Annals, 1992, vol. 523, pp. 10-18. The clashing experiences of African Americans and immigrants also produce different political demands and attitudes towards what is owed by the society.

[7] N. Glazer, Affirmative Discrimination: Ethnic Inequality and Policy, New York, Basic Books Inc. Publishers, 1978, pp. 198-200.

[8] G. Moens, op. cit., pp. 82-83, quotes Sowell as follows: "It is not a Rockefeller or a Kennedy who will be dropped to make room for quotas; it is a DeFunis or a Bakke. Even aside from personal influence on admissions decisions, the rich can give their children the kind of private schooling that will virtually assure them test scores far above the cut-off level at which sacrifices are made. Just as the students who are sacrificed are likely to come from the bottom of the white distribution, so the minority students chosen are likely to be from the top of the minority distribution. In short, it is a forced transfer of benefits from those least able to afford it to those least in need of it."

[9] For example, the person with a Spanish-surnamed mother who finds it advantageous to change his name, as in the United States affirmative action measures also apply to Spanish-surnamed Americans. N. Glazer, op. cit., p. 200.

The Indian Commission of 1953, which was established to make up a list of the backward classes to benefit from affirmative action, was confronted with the problem of high-placed castes giving up their status and position "lest they should lose the State help". F. de Zwart, loc. cit., p. 268.

[10] See HRI/Gen/1/Rev.1, (1994), Part III.

[11] In Malaysia, the Chinese and Indian poor who work in rural areas as farmers, rubber tappers or miners and in urban areas as menial workers are as much exploited as their Malaysian counterparts. They are all victims of inter-racial as well as intra-racial exploitation. According to Philips, "exploitation is a matter of class and power as well as race, a matter of economics as much as ethnicity". Although Malays benefit from affirmative action, this has done more for the Malay and non-Malay upper classes. Therefore, Philips argues for effective targeting based upon a combination of class and location, rather than on ethnic groupings. E. Philips, "Positive discrimination in Malaysia: a cautionary tale for the United Kingdom", in B. Hepple, and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, pp. 352-353.

[12] For a general overview, see G. Pitt, "Can reverse discrimination be justified?", in B. Hepple, and E. Szyszczak, op. cit., pp. 281-299; C. McCrudden, "Rethinking positive action", Industrial Law Journal, 1986, vol. 15, pp. 219-243.

[13] M.O. Chibundu, loc. cit., pp. 18-19.

[14] For example, an affirmative action plan may provide that an employer hires a certain percentage of new minority employees to a certain timetable. While the employer may have discriminated against, say, African Americans in the past, new African Americans hires who have never before applied for a job with the employer need not have been personally the victims of the employer's past discriminatory practices in order to benefit.

[15] In the words of President Lyndon Johnson, speaking about the aim of affirmative action programmes: "You do not wipe away the scars of centuries by saying: 'Now you are free to go where you want, and do as you desire'... You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, 'You are free to compete with all the others', and still justly believe that you have been completely fair ... We seek ... not just equality as a right and a theory but equality as a fact and equality as a result." Excerpt from President Johnson's speech to graduates at Howard University, June 1965, as quoted in S.M. Cahn, (ed.), The Affirmative Action Debate, London, Routledge, 1995, p. xii.

[16] United States Commission on Civil Rights, Statement on affirmative action, October 1977, p. 2, as quoted in W.L. Taylor, and S.M. Liss, "Affirmative action in the 1990s: staying the course", The Annals, 1992, vol. 523, p. 31.

[17] T. Sowell, Preferential Policies, an International Perspective, New York, William Morrow and Company Inc., pp. 148-150. Nathan Glazer (op. cit. p. 201) contends that compensation for the past is a dangerous principle. It can be extended indefinitely and make for endless trouble.

[18] M.O. Chibundu, loc. cit., pp. 18-19.

[19] Ibid., p. 34. See also B. Parekh "A case for positive discrimination", in B. Hepple and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, pp. 265-268: "A divided past cannot permit a shared present and a shared future unless the present generation finds ways of pacifying its aggrieved and tormented victims."

[20] The United States Supreme Court and the European Court of Justice have developed case law which successfully addresses indirect discrimination. In Griggs v. Duke Power Co. (401 U.S. 424, 1971) the theory of adverse or disparate impact was created which holds employers liable for the diverse effect of unjustified employment practices, regardless of the employer's particular intent. The Duke Power Co. was located in North Carolina, a southern state with a long history of segregated and deficient education for African Americans. As a result of its educational policies, a far greater number of African Americans than whites did not possess high school diplomas and were thus ineligible for many of the preferred jobs. The plaintiffs did not claim that the company intended to discriminate against African Americans, and instead rested their claim on the effect of the practices. In a unanimous and short decision, the United States Supreme Court held that the policy could be challenged under title VII of the Civil Rights Act of 1964 based on the effects of the practices. The Court explained: "Congress directed the thrust of the act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question". However, the Supreme Court restricted the "disparate effect" theory in Wards Cove Packing Co. v. Antonio (490 U.S. 642, 1989), which made it more difficult to prove claims of indirect discrimination by rendering it easier for businesses to justify policies that had a disparate impact. Yet, in 1991, a Civil Rights Act was passed which for the first time explicitly included the disparate impact theory safely within the scope of title VII of the Civil Rights Act of 1964.

The Court of Justice of Luxembourg referred to the Griggs case in its landmark decision Bilka Kaufhaus v. Weber von Hartz (CJ 13 May 1986, case 170/84, ECR 1986, 1607). The case concerned the exclusion of part-time workers from the pension scheme of a large department store. Mrs. Weber challenged this exclusionary practice on the basis of the right to equal pay as enshrined in European Community law. Though the policy in itself is gender neutral, it adversely affects women much more than men, as the greater number of part-time workers are female. The Court held that the right to equal pay "is infringed by a department store company which excludes part-time workers from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex". The Court further qualified that this requirement of "objective justification" by demanding that the measure or practice meet a "real need of the enterprise" and be "appropriate and necessary" to that end. In later cases this test was applied in the same way to indirect discrimination by the State, e.g. through discriminatory legislation, the "real need" requirement being replaced by the more general demand of a "legitimate aim". In short, establishing indirect discrimination takes two steps: showing an adverse effect/disparate impact upon a specific group and showing that there is no objective justification available. Proof of direct discrimination is determined by comparison of individuals, whereas proof of indirect discrimination involves a comparison between groups. See more in T. Loenen, "Indirect discrimination: oscillating between containment and revolution", in T. Loenen and P.R. Rodrigues, (eds), Non-discrimination Law: Comparative Perspectives, The Hague, Kluwer Law International, 1999, pp. 195-211; M. Selmi, "Indirect discrimination: a perspective from the United States", in T. Loenen and P.R. Rodrigues, (eds), op. cit., pp. 213-222; B. Vizkelety, "Adverse effect discrimination in

Canada: crossing the Rubicon from formal to substantive equality", in op. cit., pp. 223-236. I. Sjerps, "Effects and justifications. Or how to establish a prima facie case of indirect sex discrimination", in op. cit., pp. 237-263.

The most important human rights texts on discrimination, the ILO Discrimination (Employment and Occupation) Convention of 1958, the UNESCO Convention against Discrimination in Education of 1960, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, forbid discrimination defined as an act that has a discriminatory "purpose" or "effect".

Thus it is made quite clear that "intention" is not a necessary condition for establishing discrimination. The reference to "effect" makes it redundant to prove a discriminatory intent or "purpose", and indicates that indirect discrimination is also forbidden under human rights law. In his dissenting opinion in the South West Africa case, Judge Tanaka stated: "The arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned. Accordingly, the arbitrariness can be asserted without regard to ... motive or purpose" (Dissenting Opinion of Judge Tanaka, South West Africa, (2nd phase), Judgement of 18 July 1966, I.C.J. Report, 1966, p. 306).

The same belief is also held with regard to article 2 of the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. The Human Rights Committee defines "discrimination" in its General Comment 18 as "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms". (HRI/Gen/1/Rev.1, Part I, Human Rights Committee, General Comment 18, para. 7.) This definition is reflected in the Committee's case law, although somewhat inconsistently. For example, its views in K. Singh Bhinder v. Canada indicate that obvious instances of indirect discrimination will breach the International Covenant on Civil and Political Rights (A/45/40, vol. II, annex IX. sect. E, Communication No. 208/1986). Finally, the Committee on the Elimination of Racial Discrimination states: "In seeking whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent or national or ethnic origin." (HRI/GEN/1/Rev.1, Part III, Committee on the Elimination of Racial Discrimination, General Recommendation XIV on article 1 of the Convention, para. 2.) See also Lord Lester of Herne Hill and S. Joseph, "Obligations of non-discrimination", in D. Harris and S. Joseph, The International Covenant on Civil and Political Rights and the United Kingdom Law, Oxford, Clarendon Press, pp. 575-576 and A.F. Bayefsky, "The principle of equality or non-discrimination in international law", Human Rights Law Journal, 1990, pp. 8-10.

[21] See, for more, T.L. Banks, "Equality, affirmative action and diversity in the United States", C.R. Lawrence and M.J. Matsuda, We Won't Go Back: Making the Case for Affirmative Action, Boston, Houghton Mifflin Company, 1997.

[22] In this case the Supreme Court refused to address directly whether racial preferences are permissible, ruling instead that the matter was moot since the petitioner, Marco DeFunis, would complete his legal education even if he lost.

[23] The diversity concept has lately been attacked in several federal courts. The validity of diversity as a goal was questioned by a federal appellate court in Hopwood v. Texas (78 F 3d 932, 5th Cir 1996, cert denied, 135 L Ed 1094, 1997). The court reasoned that racial diversity in higher education is not a compelling governmental interest and is inconsistent with the concept of colour-blind or merit-based admissions criteria. See also Podberesky v. Kirwan (38 F 3d 52, 4th Cir 1994, cert denied, 131 L Ed 1002, 1995), S. Thernstrom, "The scandal of the law schools", Commentary, December 1997, pp. 27-31. Moreover, in 1996 the University of California Board of Regents voted to prohibit the use of race, religion, sex, colour, ethnicity or national origin in admission, employment or contracting decisions at the University of California's nine public campuses. See also California's Proposition 209, forbidding racial preferences in higher education. See also scholars with an opposite opinion, who claim that the use of racial preferences in higher education is not at all effective and amounts in most cases to a flagrant double standard. Letting minority students earn their positions through their own merit would make for a healthier racial climate. Besides, they feel that the discussion on preferences in higher education has deflected attention from the real problem: the yawning racial gap in educational performance among elementary and secondary school pupils. As long as this gap exists, efforts to engineer parity in college are, according to them, doomed to fail. Another problem is that it has not been agreed upon how much "diversity" is enough and how much harm may be inflicted upon other individuals. S. Thernstrom and A. Thernstrom, "Racial preferences: what we now know", Commentary, February 1999, pp. 44-50.

[24] G. Moens, op. cit., pp. 30-31.

[25] See more in K. Greenawalt, Discrimination and Reverse Discrimination, New York, Borzoi Books in Law and American Society, 1983, pp. 52-70; R.K. Fullinwider, The Reverse Discrimination Controversy, a Moral and Legal Analysis, New Jersey, Rowman and Littlefield, 1980, pp. 18-29; and I. Glasser, "Affirmative action and the legacy of racial injustice", in P.A. Katz and D.A. Taylor, Eliminating Racism, Profiles in Controversy, New York, Plenum Press, 1988.

[26] See M.O. Chibundu, loc. cit., pp. 31-32. See also a paper prepared by F. de Varennes, "Minority rights and the prevention of ethnic conflicts" (E/CN.4/Sub.2/AC.5/2000/CRP.3).

[27] As quoted in J.D. Skrentny, The Ironies of Affirmative Action, Chicago, The University of Chicago Press, 1996, p. 113.

[28] T. Sowell, op.cit., pp. 153-156.

[29] In Fan Yew Teng v. Public Prosecutor, the Federal Court upheld a conviction for seditious publication of an article, which criticized the Government for alleged partiality towards Malays. The court held that "these provisions cannot be questioned and are necessary to assist the less advanced or fortunate in the light of the circumstances prevailing in the country at the time of

independence". As quoted in E. Philips, "Positive discrimination in Malaysia: a cautionary tale for the United Kingdom", in B. Hepple and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, p. 352.

[30] See P.A. Samuelson, Economics, New York, McGraw-Hill Book Company, 1970, pp. 780-794.

[31] See M. Triest, "Positieve actie en arbeidsmarkt", in de Graeve and others, Positieve actie, positieve discriminatie, voorrangsbehandeling voor vrouwen, Antwerpen, Kluwer, 1990, p. 19.

[32] See G.C. Loury, "Incentive effects of affirmative action", The Annals, 1992, vol. 523, pp. 19-29; W.B. Reynolds, "Affirmative action and its negative repercussions", The Annals, op. cit., pp. 38-49.

[33] E. Philips, op. cit, pp. 344-356.

[34] See J.G. Kellas, The politics of Nationalism and Ethnicity, London, McMillan, 1991, p.125.

[35] P.E. Andrews, "Affirmative action in South Africa: transformation or tokenism?", Law in Context, 1999, pp. 80-81.

[36] See Ncholo's observations in "Equality and affirmative action in constitution-making: the Southern African case", in B. Hepple and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, pp. 412-432.

[37] "Affirmative action in South Africa has nothing to do with creating opportunities for a minority. Rather, it means transforming an economy that once barred 75 per cent of the population from any meaningful role." (quoted in P.E. Andrews, loc. cit., p. 82)

[38] J. Hodges-Aeberhard and C. Raskin Affirmative Action in the Employment of Ethnic Minorities and Persons with Disabilities, Geneva, International Labour Office. They documented their study with eight case studies on Canada, India, Lebanon, Malaysia, Norway, the Philippines, the Russian Federation and Uganda.

[39] Alison Sheridan has developed a classification system that illustrates the broad range of this type of "affirmative mobilization" measures in the specific context of combating sex discrimination and disadvantage in employment. She identifies four kinds of affirmative action strategies: (i) temperamental policies address those differences in women's personality traits, characters, attitudes, social skills and habits ("deficiencies") that often impede the advancement of women (e.g. seminars are held on gender communication and image-building, networking among women is promoted), (ii) role-related policies tackle the dichotomies and role dilemmas women experience in dealing with work and family issues, more particularly: (iii) (a) work and family policies to help women combine income-generation and home-maker roles (e.g. child care, flexible working hours, increasing opportunities for part-time work, training takes place within working hours, rules for maternity leave are made more generous, "family-friendly" clauses are put into union contracts, job-sharing), and (iii) (b) non-traditional job policies to

expand option for women (e.g. women are attracted into seagoing careers through large posters showing females working on ships, an apprenticeship brochure is written to encourage girls to apply, personnel officers encourage girls to go into engineering), (iv) social structural policies aimed at overcoming bias and exclusionary practices - the category with the largest array of measures (e.g. a formal policy on sexual harassment is adopted and publicized by posters, a scholarship programme is reviewed to ensure that merit is the primary consideration, all vacancies are first advertised internally, staff are trained to avoid sex bias, women are actively encouraged to apply for positions that have previously been occupied only by men) and (v) opportunities policies assist employees who want to move ahead (e.g. career counselling is continuously made available, career development courses are liberally provided, women are encouraged to participate in workplace committees, secretarial staff are offered technical and professional skill-building programmes). Some of these strategies can be transposed and used to overcome racial disadvantage in the workplace. A. Sheridan, "Patterns in the policies: affirmative action in Australia", Women in Management Review, 1998, pp. 243-252.

[40] Section 35 of the United Kingdom Race Relations Act renders lawful "any act done in affording persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary benefits". Section 37 states that positive action may be taken to encourage members of a racial group, or members of one sex, to apply for, or be specially trained for, work in which they have been underrepresented.

[41] This is especially the case in the United States, where the implementation of Executive Order 11246 was left up to the Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Committee (EEOC). They interpreted affirmative action as a set of specific and result-oriented procedures, making use of timetables and goals. Under President Nixon, affirmative action came to mean the setting of statistical requirements based on race, colour, and national origin for employers and educational institutions. The various federal departments created the first major "quota" plans. These quota plans are very controversial, and have been the subject of extensive case law. Yet, the acceptance of quotas and reservations will depend on the specific situation in which they will apply. For instance, most Americans seem to accept the use to correct instances of specific historic discrimination. Even conservative persons accept the idea of court-ordered quotas when past discrimination has been proven in a court of law.

[42] Quotas are objectives of personnel representation within a company or institution which are quantified and which have to be achieved within a precisely described time period. These quotas are imposed by the State or by court order. It can be that companies or institutions are ordered to make sure that within five years 10 per cent of their personnel are women. It can be that companies or institutions have to be sure that for every four men that are employed, one woman is contracted. Quotas have the discriminatory intent of restricting a specified group from a particular activity. Goals, on the other hand, are numerical target aims which a company or institution tries to achieve; formulated otherwise, only a "good faith effort" to reach them is required.

The aim is not discriminatory but affirmative in intent: to help increase the number of qualified members of a disadvantaged group in the company or institution. Yet often, in practice, goals will operate as quotas, by putting the burden on the employer to rebut the presumption of discrimination. See N. Glazer, "The future of preferential affirmative action", in P.A. Katz and D.A. Taylor, Eliminating Racism, Profiles in Controversy, New York, Plenum Press, 1988, pp. 329-339.

[43] See for a discussion on this issue, R.T. Bron, Affirmative Action at Work. Law, Politics and Ethics, Pittsburgh, University of Pittsburgh Press, 1991, pp. 37-59; J. Edwards, "Collective rights in the liberal state", Netherlands Quarterly of Human Rights, 1999, pp. 259-275.

[44] As quoted in G, Moens, op. cit. p.12.

[45] See S.M. Lipset "Equal chances versus equal results", The Annals, 1992, vol. 523, pp. 63-74. The United States dilemma remains how best to resolve the contradiction between the United States egalitarian creed and the legacy of slavery.

[46] United Nations Department for Economic and Social Information and Policy Analysis, Report on the World Social Situation 1997, (E/1997/15), paras. 105-106.

[47] Bayefsky submits that religion has also become an internationally suspect category, yet others doubt this submission. See Lord Lester of Horne Hill and S. Joseph, op. cit., p. 590. Baer points out that there is a distressing tendency on the part of some members of the United States Supreme Court to reason rigidly within categories established by earlier decisions, most notably that "race is inherently a suspect classification", i.e., any racial discrimination can survive only with "strict scrutiny". J.A. Baer, "Reverse discrimination, the dangers of hardened categories", Law and Policy Quarterly, 1982, pp. 71-94.

[48] South West Africa Cases, Second Phase, I.C.J. Reports, 18 July 1966, para. 293.

[49] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 (1970), Advisory Opinion, 1971, I.C.J. Reports 3, para. 57. See also Barcelona Traction, Light and Power Co., I.C.J. Reports, 1970, paras. 33-34.

[50] European Commission of Human Rights, East African Asians v. United Kingdom, 14 December 1973, appl. 4403/70, para. 270.

[51] For literature, see: O. de Schutter, "Égalité et différence: le débat constitutionnel sur la discrimination positive aux Etats-Unis", Revue Trimestrielle des Droits de l'Homme, pp. 347-368, the issue of The Annals, 1992, vol. 523 on "Affirmative action revisited". The following statement of the United States Commission on Civil Rights in 1984 is also important: "Simple justice is not served, however, by preferring non victims of an employer's discrimination over innocent third parties solely on account of their race in any affirmative

action plan. Such racial preferences merely constitute another form of unjustified discrimination, create a new class of victims, and, when used in public employment, offend the Constitutional principle of equal protection of the law for all citizens." G. Moens, op. cit., pp. 30-31.

[52] The recent effort in California through Proposition 209, to forbid racial preferences in higher education, is, according to Paust, inconsistent with the provisions of international treaties, such as ICCPR and ICERD, and superior federal policy set forth in these treaties, and cannot prevail. Under the Supremacy Clause, California must yield to the permissibility of affirmative action assured in international treaty law of the United States. This does not guarantee that particular measures of affirmative action will survive all constitutional challenges, but the propriety of affirmative action under international treaty law of the United States and related duties provide compelling State interests and can contribute to a continuing or evolving meaning of the Constitution compatible with generally shared values and human dignity. J.J. Paust, "Race-based affirmative action and international law", Michigan Journal of International Law, 1997, vol. 18, pp. 674-677.

[53] Abdulaziz, Cabales and Balkandali v. United Kingdom, European Court of Human Rights, 18 December 1986, Ser. A, No. 112, para. 80.

[54] See more in A.F. Bayefsky, loc. cit., pp. 22-24.

[55] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Article 2, para. 4: "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in areas referred to in Article 1, para. 1." In 1984, this directive was complemented with a Council Recommendation of 13 December 1984 on the promotion of positive action for women. This recommendation was motivated by the following consideration: "... legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by Governments, both sides of industry and other bodies concerned to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures", and recommends Member States "to adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, within the framework of national policies and practices, while fully respecting the spheres of competence of the two sides of industry."

[56] See more in: E. Szyszczak, "Positive action after Kalanke", Modern Law Review, 1996, pp. 876-883; G.F. Mancini, S. O'Leary, "The new frontiers of sex equality law in the European Union", European Law Review, 1999, pp. 331-353. E. Ellis, "Recent developments in European Community sex equality law", Common Market Law Review, 1998, pp. 404-406. C. McCrudden, "The legal approach to equal opportunities in Europe: past, present and future", International Journal of Discrimination and the Law, 1998, pp. 200-201. A.G. Veldman,

"Preferential treatment in European Community law: current legal developments and the impact on national practices", in T. Loenen and P.R. Rodrigues, Non-discrimination laws: comparative perspectives, The Hague, Kluwer Law International, 1999, pp. 279-291.

For articles in relation to national legislation see V. Sacks, "Tackling discrimination positively in Britain" and J. Shaw, "Positive action for women in Germany", both in B. Hepple and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, respectively pp. 357-385 and pp. 386-411.

[57] C-450/93, Kalanke v. Bremen, 17 October 1995, E.C.R. I-3051.

[58] C-409/95, Marshall v. Land Nordrhein-Westfalen, 11 November 1997, E.C.R. I-6363.

[59] It is interesting that various Governments submitted written observations in defence of the national rule.

[60] Article 2.2 of the International Convention on the Elimination of All Forms of Racial Discrimination states: "State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved".

Article 3 of the Convention on the Elimination of All Forms of Discrimination against Women states: "State Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men."

[61] See, for example, Human Rights Committee, General Comment 4 on article 3, (see HRI/GEN/1/Rev.1, Part I) (1994), para. 2: "Firstly, article 3, or articles 2 (1) and 26 insofar as those articles primarily deal with the prevention of discrimination on a number of grounds, among which sex is one, requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights."

[62] Ibid.

[63] For example, Committee on the Elimination of Discrimination against Women, General Recommendation No. 8 on implementation of article 8 of the Convention (see HRI/GEN/1/Rev.1, Part IV) (1994): "Recommends that States parties take further direct measures in accordance with article 4 of the Convention to ensure the full implementation of article 8 of the Convention and to ensure to women on equal terms with men and without any discrimination the opportunities to represent their Government at the international level and to

participate in the work of international organizations." Committee on Economic, Social and Cultural Rights, General Comment No. 5 on persons with disabilities (see E/C.12/1994/13) para. 9: "The obligation of States parties to the Covenant to promote progressive realization of the relevant right to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities."

[64] Committee on the Elimination of Discrimination against Women, General Recommendation No. 5 on temporary special measures (see HRI/GEN/1/Rev.1. Part IV).

[65] Human Rights Committee, General Comment 18 on non-discrimination (see HRI/GEN/1/Rev.1, Part I, (1994), para. 10.

[66] M. Craven, The International Covenant on Economic, Social and Cultural Rights, a Perspective on its Development, Oxford, Clarendon Press, 1995, p. 186.

[67] B.G. Ramcharan, op. cit. p. 261; A. Bayefsky, loc. cit., pp. 27-33; E. Vogel-Polsky. Les actions positives et les contraintes constitutionelles et legislatives qui pèsent sur leur mise en œuvre dans les Etats Membres du Conseil de l'Europe, Comitè europeèn pour l'ègalitè entre les femmes et les hommes, Strasbourg, 27-29 avril 1992, CEEG, (87), 14, 11.

[68] E. Vogel-Polsky, "Les actions positives dans la thèorie juridique contemporaine", in B. de Grave, (ed.), Positieve actie, positieve discriminatie, voorrangsbehandeling voor vrouwen, Tegenspraak-Cahier 8, Antwerpen, Kluwer, 1990, p. 79.

[69] European Court of Human Rights, Marckx v. Belgium, 13 June 1978, vol. 31, Ser. A., para. 31.

[70] See for a discussion M.B. Abram, "Affirmative action: fair shakers and social engineers", in C. McCrudden, (ed.), Anti-discrimination Law, Dartmouth, The International Library of Essays in Law and Legal Theory, 1991, pp. 499-513; S. Fredman, "Reversing discrimination", The Law Quarterly Review, 1997, pp. 575-600.

[71] G. Moens, op. cit. p. 11.

[72] E. Vogel-Polsky, "Les actions positives dans la thèorie juridique contemporaine", in B. de Grave (ed.), Positieve actie, positieve discriminatie, voorrangsbehandeling voor vrouwen, Tegenspraak-Cahir 8, Antwerpen, Kluwer, 1990, pp. 75-77.

[73] For a summary of all the arguments for and against equality of opportunity and equality of results, see C. McCrudden, Anti-discrimination Law, Dartmouth, The International Library of Essays in Law and Legal Theory, 1991, pp. xvi-xviii.

[74] See, for instance, on the evolution of affirmative action in Australia, G. Moens, op. cit., pp. 53-74, and for a history on affirmative action in the United States, D. McWhirter. The end of affirmative action, where do we go from here?, New York, Birch Lane Press, 1996.

[75] T. Sowell, (op. cit., p. 165) recalls that in the United States, preferential policies have repeatedly been rejected in public opinion polls. However, the same United States public has strongly supported special educational or vocational courses, free of charge, for the empowerment of minority groups.

[76] United Nations Department for Economic and Social Information and Policy Analysis, Report on the World Social Situation, 1997 (E/1997/15), chap. VIII, para. 94.

**Annex**

## QUESTIONNAIRE ON AFFIRMATIVE ACTION

1. What are the principal constitutional and/or legislative provisions relating to the principle of equality and the prohibition of discrimination? Please provide copies of the relevant provisions.

2. Provide landmark judgements relating to the principle of equality and the prohibition of discrimination.

3. Are there any provisions of a constitutional, legislative or executive nature referring to the concept of "affirmative action" and/or of so-called "positive" or "reverse" discrimination? If so, please provide copies of the relevant provisions.

4. What, according to those provisions or to national case law, is the relationship between prohibition of discrimination and the concept of affirmative action?

5. Provide examples of national affirmative action schemes implemented pursuant to those provisions.

6. What groups are targeted by those affirmative action schemes (women, racial groups, specific minorities, indigenous peoples, migrants, disabled persons, veterans, etc.)?

7. To what fields do those affirmative action schemes apply (education, employment, housing, transportation, the ballot box, training, appointments to political, executive or judicial posts, the award of contracts or scholarships, other fields)?

8. What is the historical context in which those affirmative action schemes have been adopted?

9. What are the stated objectives in relation to those affirmative action schemes?

10. Are there any time limits to those affirmative action schemes and how will it be determined whether and when the objectives of those affirmative action schemes are achieved?

11. Do the affirmative action schemes apply equally to all groups involved or are any distinctions made in favour of one or more specific groups over others? How are those specific groups defined?

12. Is there any national case law relating to those affirmative action schemes? If so, please provide copies of the principal judgements.

13. Are there any specific bodies, authorities, commissions, tribunals or courts competent to hear complaints in relation to the implementation and operation of affirmative action schemes?

14. Who is entitled to lodge complaints and start proceedings before such organs?

15. Provide, if available, statistics indicating the success of affirmative action schemes and particularly the progress made since their introduction.

Note: If affirmative action schemes relating to different groups have been adopted, answers should be given for each group specifically.

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# PREVENTION OF DISCRIMINATION AND PROTECTION OF INDIGENOUS PEOPLES AND MINORITIES

## Working paper by Mr. Rajendra Kalidas Wimala Goonesekere on the topic of discrimination based on work and descent, submitted pursuant to Sub-Commission resolution 2000/4

GE.01-14220 (E) 030701

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## Introduction

1. At its fifty-second meeting the Sub-Commission for the Promotion and Protection of Human Rights in resolution 2000/4 declared that discrimination based on work and descent is a form of discrimination prohibited by international human rights law and decided to entrust Mr. Rajendra Kalidas Wimala Goonesekere with the task of preparing, without financial implications, a working paper on the topic of discrimination based on work and descent in order:

(a) To identify communities in which discrimination based on occupation and descent continues to be experienced in practice;

(b) To examine existing constitutional, legislative and administrative measures for the abolition of such discrimination; and

(c) To make any further concrete recommendations and proposals for the effective elimination of such discrimination as may be appropriate in the light of such examination.

The present report is submitted in accordance with that decision.

2. The Universal Declaration of Human Rights states "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (art. 1). In article 2 it is expressly stated that everyone is entitled to all the rights and freedoms without distinction of any kind "such as race ... national or social origin, property, birth or other status".

3. Like other forms of discrimination, therefore, any distinction, exclusion, restriction or preference based on work and descent which has the purpose or effect of nullifying or impeding the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms contravenes the spirit and letter of international human rights law.

4. The International Covenant on Civil and Political Rights recognizes that all persons are entitled to the equal protection of the law "without any discrimination" (art. 26). The International Convention on the Elimination of All Forms of Racial Discrimination specifically prohibits discrimination based on "descent" which the Committee on the Elimination of Racial Discrimination (CERD) has interpreted to mean not solely race but tribal or caste distinctions as well. In its General Recommendation XIV CERD stated that "in seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent or national or ethnic origin".

5. The International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone "to gain his living by work which he freely chooses or accepts" (article 6, para. 1).

6. The International Labour Organization Discrimination (Employment and Occupation) Convention, 1958 (No. 111) calls on States to "eliminate discrimination based on race ... national extraction or social origin", in the matter of employment or occupation. The United Nations

Educational, Scientific and Cultural Organization Convention against Discrimination in Education of 1960 asserts the principle of non-discrimination in education based on "race ... national or social origin, economic condition or birth".

7. Discrimination based on work and descent is a long-standing practice in many societies throughout the world and affects a large portion of the world's population. Discrimination based on descent manifests itself most notably in caste- (or tribe-) based distinctions. These distinctions, determined by birth, result in serious violations across the full spectrum of civil, cultural, economic, political and social rights. Likewise, the nature of a person's work or occupation is often the reason for, or a result of, discrimination against the person. Persons who perform the least desirable jobs in a society are often victims of double discrimination, suffering first from the nature of the work they must perform and suffering again by the denial of their rights because they perform work that is unacceptable. In most cases, a person's descent determines or is intimately connected with the type of work they are afforded in the society. Victims of discrimination based on descent are singled out, not because of a difference in physical appearance or race, but rather by their membership in an endogamous social group that has been isolated socially and occupationally from other groups in the society.

## I. COMMUNITIES WHERE DISCRIMINATION BASED ON WORK AND DESCENT IS EXPERIENCED

8. Instances of discrimination based on work and descent have been identified in many different social and cultural contexts. The manifestations of such discrimination commonly include prohibitions on intermarriage between socially or occupationally defined groups; physical segregation of communities; restrictions upon access to resources including land, water and other means of production; social prohibitions regarding physical contact such as sharing food or utensils; restrictions on access to education or segregation in educational facilities; restrictions on access to religious buildings and restrictions on participation in religious ceremonies. The most widespread discrimination on the basis of work and descent occurs in societies in which at least a portion of the population is influenced by the tradition of caste, including the Asian countries of Bangladesh, India, Nepal, Pakistan and Sri Lanka.

### A. India

> "We must say that the National Human Rights Commission as well as the UN General Assembly should recognize that caste, as an institution itself, is a source of gross violation of human rights. Therefore it must be treated on a par with the existence and operation of racism and apartheid. The caste system and the equally obnoxious practice of untouchability must be taken seriously by the Indian and international communities and administrative bodies." - Interim Observations and Recommendations of the Jury of the National Public Hearing on Dalit Human Rights Violations, Chennai, April 2000.[1]

9. In 1937, Dr. B.R. Ambedkar, a learned and respected Indian leader and advocate of the rights of untouchables - or Dalits, as he called them - and himself an untouchable, announced that he had made a momentous decision to renounce the religion of his birth, Hinduism, because he traced a great social injustice in contemporary Indian society, namely the caste system, to

Hindu scriptures. Mahatma Gandhi, the spiritual leader of India, who was moved by the plight of the untouchables, was himself not prepared to blame Hinduism for the appalling discrimination against millions of Indians by other Indians. In a response to Dr. Ambedkar, the Mahatma said:

> "Caste has nothing to do with religion. It is a custom whose origin I do not know and do not need to know for the satisfaction of my spiritual hunger ... The law of Varna teaches us that each one of us earns our bread by following the ancestral calling. It defines not our rights but our duties. It also follows that there is no calling too low and none too high. All are good, lawful and absolutely equal in status."[2]

10. The Mandal Commission on the reservation of government jobs for Scheduled Tribes and Other Backward Classes in its 1980 report said of the caste system: "The social ranks and their respective duties, ordained by God for humanity, were intended to remain fixed and unmovable. Like the limbs of the body they cannot properly exchange either their place or function."[3]

11. The debate as to whether caste is or is not derived from Hindu scriptures need not detain us because 85 per cent of India's 1 billion people remain Hindu. Only a few million followed Dr. Ambedkar and became Buddhists. Lesser numbers became converts to Christianity and Islam. India is a stratified or compartmental society not based on class but on descent or occupation. It has been so for many thousand years. Dr. Ambedkar, as Minister of Law and Chairman of the Drafting Committee of the Constituent Assembly, was responsible for the many provisions in the Constitution intended to fulfil the promise in the preamble to secure to all citizens justice and equality of status and opportunity.

12. Besides untouchables, there are other underprivileged segments of Indian society who are grouped as Scheduled Tribes and Other Backward Classes and they number many millions. Scheduled Tribes are distinguished by tribal characteristics such as social, religious, linguistic and cultural distinctions. In addition, they are concentrated in certain geographical areas. While they are officially recognized as deserving of special treatment, the policy towards them is to effect improvements of their conditions while at the same time preserving their distinctiveness and giving them a measure of autonomy. In the case of Other Backward Classes there is the initial difficulty of identifying the persons who fit the description.[4]

13. They appear to include all religious minorities who are economically poor and lacking in educational opportunities. The Mandal Commission report identified 3,743 sub-castes as being socially and educationally backward, and found that Other Backward Classes constituted 52 per cent of the population. That was in addition to the Scheduled Castes/Tribes, which constituted a separate category of 22.5 per cent of the population. Dalits estimate that they constitute 19 per cent of the population, or 160 million people. The present study does not include Scheduled Tribes and Other Backward Classes as the discrimination against them, where it exists, cannot strictly be said to be based on work or descent.

14. Those who suffer discrimination based on descent or work have received different names. Official terms were "untouchables", "depressed classes" or "scheduled castes". For Gandhi, they were "Harijans" or "people of God" rather than "untouchables". Today they are known as Dalits, or "oppressed people" or "broken people".

15. Hindu society recognizes a caste hierarchy of four classes or varnas: Brahmins (priests and scholars); Kshathriyas (rulers and soldiers); Vaishyas (merchants and farmers); and Sudras (servant class). The Sudras, the lowest caste, are seen as persons who exist to serve the higher castes or "twice born". Servility is their badge and with it loss of dignity. According to some researchers there were upper Sudras and lower Sudras, depending on the work they performed. Artisans, carpenters, barbers, washermen and the like belonged to the former while those engaged in unclean work such as sweepers, scavengers, cobblers, cremation workers, hide and leather workers, agricultural labourers, toddy tappers* belonged to the latter. Those considered to be at the lower end of the Sudras are not in fact Sudras but are untouchables who are outside the caste system or "outcastes", or they constitute a distinct fifth caste.

16. In the mind of the upper castes untouchables are polluted by their work and polluting to others by contact which must therefore be avoided at all costs. A corollary is pointed out by the Mandal Commission: "The real triumph of the caste system lies not in upholding the supremacy of the Brahmin, but in conditioning the consciousness of the lower castes in accepting their inferior status in the ritual hierarchy as part of the natural order of things."[5]

17. Untouchability conveys "a sense of impurity and defilement. It implies certain socio-religious disabilities. It includes customs, practices sanctioned by the rigid Indian caste system whereby persons belonging to the Scheduled Castes were debarred from entering Hindu temples, public places, streets, public conveyances, eating places, educational institutions, etc."[6] There are other disadvantages - segregation in colonies in the village, denial of land rights, low wages for manual work, denial of access to services, e.g. by barbers and washermen, to health care and education. Untouchables belong to castes which have the lowest ritual standing and often the most depressed economic condition.

18. In the course of time occupations may have changed and many Dalits are now engaged in agriculture as landless labourers, as this activity has been opened to all. But this is not so in the case of other occupations to which access is not permitted by caste traditions. It is not merely the indignities heaped on Dalits that make them an oppressed people. Because of the social ostracism and economic deprivation they suffer, they often fall prey to the most serious forms of persecution in their society, including killings, mutilation, rape, arson, destruction of property and other forms of violence (sometimes regrettably by State agents) when they assert their rights.

19. The Government of India has taken several steps to prohibit the practice of untouchability. First, and most importantly, the Government has recognized the existence of the problem. Second, the Government has made determined efforts to deal with it. The

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* Men who tap the sap of palm trees, used for drinking and the brewing of spirits.

Constitution of India in its Bill of Rights (Part III), besides guaranteeing to all citizens the basic civil and political rights and fundamental freedoms has special provisions that are directed at the practice of caste discrimination:

(a) Article 15 prohibits subjection to a disadvantage based on caste with respect to access to shops, public restaurants, etc. or to the use of wells, roads and public places maintained out of State funds;

(b) Article 16 prohibits discrimination on the ground of caste or descent in respect of employment under the State;

(c) Article 17 abolishes untouchability and prohibits its practice in any form;

(d) Article 23 prohibits forced labour and discrimination on the ground of caste when imposing compulsory service for public purposes;

(e) Article 29 (2) prohibits denial of admission to any educational institution on the ground of caste;

(f) There are also positive duties imposed on the State to redress imbalances due to past injustices against untouchables. Article 15 (4) permits the State to make special provisions for the advancement of any socially and educationally backward class of citizens, including Scheduled Castes;

(g) Article 16 (4) permits the State to reserve appointments for members of backward classes not adequately represented in the State services.

20. Articles 15 (4) and 16 (4) recognize beneficial discrimination or protective/compensatory/preferential discrimination, or simply affirmative action. Indeed, in the governance of the country the State is enjoined by a directive principle of State policy (art. 46) to "promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the Scheduled Castes and the Scheduled Tribes, and to protect them from social injustice and all forms of exploitation". But it is important to note that in the implementation of these provisions the efficiency of the administration is not to be sacrificed (art. 355).

21. Other provisions in the Constitution addressing caste discrimination are:

(a) Article 325 which prohibits disfranchisement on the ground of caste;

(b) Articles 330 and 333 which provide for reserving of seats for members of Scheduled Castes and Scheduled Tribes in Union and state legislatures according to the Scheduled Caste population in each constituency;

(c) Article 338 which mandates the appointment of a National Commission for Scheduled Castes and Scheduled Tribes. The Commission has been appointed and investigates and monitors all matters relating to the safeguards provided for Scheduled Castes;

(d) Article 341 which makes possible the legal identification of Scheduled Castes or untouchables by means of lists prepared for each state and union territory. The list, when published by the President, is final as to the castes or groups within castes deemed to be Scheduled Castes. The current state and union lists, when totalled, contain more than 1,000 castes but, given the fact that the same castes appear in the different state lists, the estimate given of 76 Scheduled Castes is probably correct.

22. To bolster the constitutional provisions, India has passed several laws:

(a) The Protection of Civil Rights (Anti-Untouchability) Act, 1955, strengthened by an amendment in 1973, punishes offences that amount to the observance of untouchability, such as prohibiting entry to temples or insulting someone on the basis of his caste;

(b) The Bonded Labour (Abolition) Act, 1976 aims at the release of labourers (usually Dalits) who work in slave-like conditions in order to pay off a debt due to a high caste employer, by cancelling any outstanding debt and prohibiting the creation of new bondage agreements;

(c) The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. This important law was needed because of the high incidence of recurrent acts of violence against helpless Dalits throughout the country. Eighteen atrocities are listed, including violence against women, dispossession of a Dalit of his land, mischief by fire and destruction of property. Penal Code offences carrying a punishment of 10 years' imprisonment if committed against a member of a Scheduled Caste are punishable by imprisonment for life. The offences are cognizable and non-bailable. There are special courts to provide speedy trials and special prosecutors to conduct cases. In 1999 rules were enacted under the Act to strengthen the investigation process and make provision for payment of compensation to victims;

(d) The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. A special law was considered necessary to deal with the most distressing discrimination based on work and descent. There are an estimated 800,000 people, mainly women, who are engaged in cleaning dry latrines using the most primitive methods. The law itself describes this as a "dehumanizing practice" and is intended to make it obligatory to convert dry latrines into water-seal latrines. For the implementation of the Act the National Commission for Safai Karamcharis was appointed. In its 1997 report the Commission found that manual scavengers are "totally cut off from the mainstream of progress and are still subjected to the worst kind of oppression and indignities". What is more pathetic is the fact that manual scavenging is still largely a hereditary occupation. Safai Karamcharis are no doubt the most oppressed and disadvantaged section of the population.[7] There is unfortunately evidence that manual scavengers are considered untouchable by other untouchables;[8]

(e) Land reform laws to redistribute land to the landless.

23. It is an impressive list of the actions that have been taken by the Government of India. That improvements have taken place cannot be doubted and credit should probably go to the National Human Rights Commission, the National Commission for Women, the Scheduled

Castes and Scheduled Tribes Commission and the National Commission for Safai Karamcharis. A micro-level study in the States of Karnataka, Gujerat, Andra Pradesh and Orissa has led a scholar to conclude that:

> "Like other institutions, caste- and untouchability-based discrimination in the Indian society has undergone change. The practice of untouchability and resultant discrimination has reduced in the public sphere, like panchyat offices, schools, use of public roads, public transport, health and medical services, services of shops (for buying goods) and services rendered by the tailor, barber, eating places and tea shops in large villages and urban areas. But even here discrimination in various subtle forms prevail."[9]

24. If in urban areas it is more the hidden or invisible discrimination that a Dalit would encounter, in rural areas where three fourths of the Dalits live open discrimination in all its forms is fairly widespread. The overall picture is depressing. In school education there is a marked literacy gap between the Scheduled Castes and the rest of the population. It is reported that reserved quotas in the universities are not filled, especially in the technical and professional courses. There is reportedly poor representation of Scheduled Castes in teaching posts and caste clustering. There has been inadequate distribution of lands among the Scheduled Castes promised under the Ceiling of Land Acts. The shame of bonded labour remains for millions, including a large number of children. The hideous occupation of manual scavenging continues except in a few states. If reports are to be believed no real effort has been made to improve the conditions of work for these wretched people who out of sheer necessity find that it is their lot to clean dry latrines.

25. The reservation of quotas in government employment and education has run into the vexed problem of having to determine whether caste alone should be the test or whether caste should be combined with economic need. Quota reservations in state employment are being filled in lower category jobs such as sweepers, peons and clerks. In the absence of quotas there is hardly any representation in the defence forces, scientific establishments and the judiciary. The Scheduled Castes have not benefited from the economic progress made in the country in the 50 years since independence because there has been no policy in the allocation of resources. In the rapidly growing private sector there does not seem to be any opportunities for advancement for members of Scheduled Castes.

26. At the same time atrocities are being committed almost daily against Dalits and they go unpunished. These have been researched and documented, mainly by Dalit organizations, in several publications in horrifying detail.[10] The laws are there, but there is a clear lack of will on the part of law enforcement officers to take action owing to caste prejudice on their part or deference shown to higher-caste perpetrators. The Supreme Court in State of Kerala vs. Appu Balu said: "More than 75 per cent of the cases under the (SC/ST) Act are ending in acquittal at all levels."[11] What is frightening is that the atrocities committed - murder, rape, mutilation, arson, etc. - are not only isolated acts but could even be acts of mass savagery committed by militia groups employed by the higher castes.[12] The inability of the police and courts to deal with these crimes has had a backlash effect on young Dalits who also themselves have formed armed groups or Naxalites.

27. The present situation in India could not have been better expressed than in the words of the National Scheduled Caste and Scheduled Tribes Commission:

> "The task ahead is clearly, therefore, to focus on the basic needs and requirements of SCs/STs and give them the social dignity and the economic capability to come at par with other sections of the society and become part of the mainstream which had been the charter visualized by the Constitutional makers 50 years ago. Such a strategy would not only control the feeling of alienation, frustration and rising military and civil strife but would also make the SCs/STs active partners in nation building."

## B. Sri Lanka

28. In Sri Lanka there are two caste systems, one for the Sinhalese and the other for the Tamils. Although they both have their origin in India, the Sinhalese caste system is not linked to the Hindu varna. It was an aspect of a feudal society which divided people "according to Descent and Blood"[13] or according to their hereditary roles and functions. The caste system was a secular hierarchy. The stratification took into account as many caste and sub-caste groups as there were feudal services and functions or temple services to perform in a disputed hierarchical order. There were no non-untouchables in the Indian sense. Social distance was practised but the notion of pollution hardly existed. As an American scholar concluded, "The absence of the Hindu concept had rendered the Sinhalese caste system mild and humanitarian when judged by Indian standards."[14]

29. The exception is the caste of Rodiyas or Rodi (meaning "filth") from very early times. Many legends surround their origin, all agreeing that they were banished for a heinous crime and condemned to a life of begging or, more accurately, soliciting for alms. They were denied land and work and subjected to many disadvantages and degrading treatment. They were a despised lot; even in the middle of the nineteenth century they suffered "untouchability with a vengeance". They were always a small community of about 500 families living mainly in the central highlands in their own colonies of huts devoid of amenities.

30. During 150 years of British rule when caste distinctions were not officially recognized, there was a high degree of mobility from low caste groups to positions of social standing through entry into professions, business and politics. Desertions from traditional caste occupations were easily achieved through education, and caste became a status concept.[15]

31. In the case of the Rodi the process has been much slower. Through the efforts of the Backward Communities Development Board, Rodi children were able to attend village schools. Government land was given to them for cultivation. While official sympathy was shown to the Rodi the prejudices of villagers were not easily overcome; however, there is no evidence of any atrocities committed against the Rodi. Farming and casual labour have provided some opportunities but they have not been completely emancipated from the economic point of view: for many Rodi the old life outside the social system has continued.[16]

32. The caste system of the Tamils, who are mostly Hindus, is also occupation based. Tamils have high and low caste groups which show a stronger concept of pollution and social distance.

At the bottom of the caste hierarchy are three castes of untouchables who suffer social disadvantage more than others. While Pallas and Nalavas (descendants of former slaves) can work on upper caste land for wages or rent garden land from them, Paraiyars engage mainly in so-called unclean work.

33. While the numerically powerful Vellala or farmer caste is not inclined to loosen its dominant position in society over all other castes, upward mobility could not be prevented after American missionary schools were established in the nineteenth century and education was opened to all without caste distinction.[17] Descent is still important in Tamil society and prejudice is more openly shown. It is manifested publicly in acrimonious disputes over temple entry. Only a small number of temples are open to non-Vellala worshippers.

34. Recognizing that social disadvantages were imposed on people based on the accident of birth or the work they perform, the Prevention of Social Disabilities Act, 1957 was passed in 1957. The Act made it an offence for any person to discriminate against another on the ground of his caste in the matter of access to shops, public eating houses and hostels, public wells, hairdressing salons, laundries, cemeteries, places of worship, or for purposes of education and employment. In 1971 the Act was amended to strengthen its priorities and to impose heavier punishment. Initially there were some prosecutions in the North but there was a tendency for the police not to take action against violations. In a celebrated temple-entry case, the Act was challenged as interfering with customs and ancient usages that prohibited defilement of a Hindu temple by the entry of low-caste persons. This argument was rejected by the Supreme Court and Privy Council.[18]

35. The 1978 Constitution prohibits discrimination on the ground of caste (art. 12 (2)) and prohibits subjecting a person by reason of his caste to any disadvantage with regard to access to shops, public restaurants, etc. and places of public worship of his own religion. There are no affirmative action provisions as in India. Discrimination based on descent and work may not have disappeared, but there are no signs that it is a problem.

36. A recent allegation of discrimination based on descent is that made by Tamils of Indian origin employed mainly as tea estate workers in the hill country. With regard to wages, housing, sanitation, health and educational facilities, they were an oppressed group. Improvements have slowly been made as a result of government policies and powerful trade union action. Integration with the rest of society is more difficult owing to prejudice, but this is breaking down. There are signs of upward mobility through education and non-discriminatory laws. Caste distinctions exist among themselves and complaints have been made that workers (mostly Dalits) are kept out of trade union office by high caste supervisors. The citizenship laws enacted after independence rendered Indian Tamils, who numbered about 1 million, stateless, and they were denied voting rights. Subsequent laws based on agreements between the Governments of India and Sri Lanka have enabled them to acquire citizenship by registration without any distinction being made between them and others who are citizens by descent.

## C. Nepal

37. Nepal has predominantly Hindu population and a caste system similar to that of India. About 21 per cent of the population of 22 million constitute the service castes

(untouchables/Dalits) who are engaged in traditional occupations with low status value. They range from artisans and singers to castes doing unclean work like scavenging and removing dead animals. What unites them is that they are subject to hurtful discrimination - segregation, exclusion from public institutions such as hostels, restaurants and milk cooperatives, or denied free access to water, schools and temples, on the one hand, and deprived of rights, facilities and opportunities given to others to improve their conditions, on the other.

38. Untouchability was declared illegal in 1963 but the practice was not made punishable until the onset of multi-party democracy in 1990. The Constitution of 1990 guarantees the fundamental rights of the people and makes any discrimination against untouchables punishable by law. The National Code that prohibited Dalits from entering temples and religious sites was declared invalid by the Supreme Court in 1993. The Government is committed to implementing policies aimed at the advancement of Dalits. Thus, the "Independent Downtrodden and Oppressed Community Council" was formed in 1998 with the objective of coordinating policies and supervising programmes to benefit Dalits. The Ninth Five-Year Plan adopted several specific policies and programmes for the socio-economic development of the Dalits, including in education, health, sanitation, training and capability enhancement, and employment.

39. While these winds of change are appreciated, Dalits complain that untouchability has not been eliminated, that there is unequal distribution of resources, that many of them lack agricultural land and that they remain economically and socially depressed. The Government has acknowledged that "for an overwhelming majority of people the caste system continues to be an extremely salient feature of personal identity and social relationships and, to some extent, determines access to social opportunities".[19] At the Asian Regional Preparatory Meeting for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Tehran in February 2000, the Government, whilst again admitting the problem of caste discrimination, declared that the issue should be addressed at the World Conference.

## D. Japan

40. Japanese feudal society, which started 400 years ago and lasted till 1867, left a class structure that placed "humble people" at the bottom. They consisted of eta (extreme filth) and hinin (non-human). The eta were assigned such duties as disposing of dead cattle, leather production, being security guards and sweeping while hinin made their living as security guards, executioners and performers.[20] The Buraku, as they are now known, were subjected to intense prejudice and discrimination, forbidden to marry or have physical contact with common people as such contact was seen as "polluting" the higher classes. They were an outcast population confined to living in hamlets, now officially classified as Dowa districts. The people of a Dowa district consist of the original eta and hinin people and others who have moved there. The official figures are 4,442 Dowa districts with a total population of 1.2 million Burakumin, but the unofficial figures are 6,000 and 3 million, respectively. The discrimination is not only against those who work in traditional occupations.

41. Beginning with the Emancipation Edict, 1871, many laws have been enacted addressing the Buraku issue. Article 14 of the Constitution of 1946 states: "All people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." But a government report in 1965 conceded that the

Burakumin are "placed in such an inferior position economically, socially and culturally that their fundamental human rights are grossly violated even in present-day society and that, in particular, their civil rights and liberties which are assured to all people as a principle of modern society are not guaranteed in reality". The State's responsibility to solve the Buraku problem was accepted and special laws were passed in 1969, 1982 and 1987. The Law for the Measures for Promotion of Human Rights Protection, 1996, established a committee to analyse the extent of Buraku discrimination and make recommendations for human rights education and relief measures for victims.[21] The Law on the Promotion of Human Rights Education and Human Rights Awareness-Raising, 2000 was the result of a national campaign for the enactment of a fundamental law for Buraku liberation.

42. It is admitted that the living standard of Buraku people has improved, but discrimination in marriage and employment continues. Particularly hurtful is the use of derogatory terms in speech and writing. Also a matter of concern in the printing of lists of Buraku households with the names of the occupants, drawn up after private investigation and made available to big companies to prevent the employment of Burakumin. Government has enacted laws against such activities but the practice continues.[22]

### E. Pakistan

43. Swat is an area of northern Pakistan which had a system of stratification of unequal social groups (qoum) that can be compared to the Hindu caste system, except that the people are Sunni Muslims. The concept of ritual pollution is absent, its place taken by notions of privilege and shame. The population of the area is about 500,000 and the people are dependant on subsistence agriculture. The groups are such as are to be found in an agricultural community, and at the bottom are despised people - sweepers, washermen, barbers and those who work with the guts of animals. There is pollution by occupation but caste status by birth does not prevent change of occupation. In ritual activities there is equality but in everyday situations a distinction exists.[23]

44. In Sindh Province there are about 1.8 million persons living in bondage as agricultural workers, the majority of whom are Dalits originally from India. A large number of Dalit families work in the brick kiln industry, also under conditions of total bondage. Bonded families are virtual prisoners and not permitted to leave until the debt is paid. In 1992 the Bonded Labour (Abolition) Act was passed but observers note that even when the national police take action state prosecutors fail to file charges.

## II. VIOLATIONS AGAINST WOMEN AND CHILDREN

45. In addition to suffering discrimination on the basis of work and descent, Dalit women and girls also suffer gender discrimination. Women in Dalit communities in Asia are poorly educated and subjected to gruelling labour and many forms of violence, including trafficking and prostitution. Dalit women are consistently subjected to physical abuse and sexual exploitation by higher caste landlords. Women are raped, mutilated and murdered during caste violence. Dalit women do not regularly report incidents of sexual assault because of entrenched biases at every stage of the process.

46. Most girls and women in India's and Nepal's urban brothels are from lower caste, tribal or minority communities. The practice of devadasi involves the marriage or dedication of a pre-pubescent low-caste girl to a deity or temple. Once dedicated, the girls are unable to marry; their role is to serve as prostitutes to the higher caste men in the village. Some states in India have passed laws prohibiting the practice of dedication but they are reportedly not well enforced.

47. India has tried to remedy discrimination against women by adopting a constitutional amendment in 1993 that provided for one third of all panchyat, or village council, seats and village chief positions to be reserved for women and also reserved a percentage of those for women from the lowest rungs of the caste system. In Nepal the Constitution requires that 5 per cent of candidates put up by national parties be women, and in local government 5 per cent of the seats are reserved for women. It would appear, however, that Dalit women are not represented at the national or local level.

## III. CONCLUDING REMARKS

48. The people described in this paper are estimated to number 250 million. It is a staggering number by any account. They have inherited a life of burdens and few rights, a life of continuous discrimination, a life without dignity. What wrongs have they committed? The world may have changed around them but not for them. They are ruled by traditions which are hundreds, and sometimes even thousands of years old, traditions that cannot be justified today. It is sometimes said that they are not a race as understood in the international instruments. But they are in fact a race of broken people with commonalities that bring them together. They speak in many tongues but with one voice to ask for social justice and good governance that will end the miseries in their daily lives. They are a people subject to violations of their human rights. It is the responsibility of the respective States to endeavour, not merely the passing of remedial laws, but by positive State action, to ensure that these violations do not go unpunished. The strict enforcement of the law can assist the other ongoing educational processes in society to bring about attitudinal changes in the direction of tolerance, compassion and justice.

49. The focus of this paper has been countries in Asia. At the time the resolution was discussed in the Sub-Commission it was mentioned the problem was not limited to Asia alone and that it existed in some parts of Africa and perhaps in South America. The author has not been able to include in this paper the situation in these other areas because of constraints of time and lack of access to relevant material.

50. This paper, which is introductory in nature, will hopefully demonstrate that there is a serious problem of human rights violations arising from work and descent. The many complaints of discrimination voiced at the United Nations General Assembly, the Human Rights Committee, CERD and the Sub-Commission itself merit further study, with the assistance of the Governments of the countries concerned.

**Notes**

[1] Dalit Human Rights Violations. vol. I, 314. The Jury consisted of the following eminent persons: Justice K. Punniah, former Judge, Andra Pradesh High Court; Justice H. Suresh, former Judge, Bombay High Court; Dr. Mohini Giri, former Chairperson, National Commission for Women; Justice Amir Das, former Judge, Patna High Court; Dr. Vasanthi Devi, former Vice-Chancellor, MS University, Tirunelveli; Ms. Kumud Pawde, Dalit Writer; Ms. Sona Khan, Advocate, Supreme Court; Ms. Rani Jethmalani, Advocate, Supreme Court; Dr. R.K. Nagak, Founder and Director, NISWASS.

[2] Dr. Ambedkar's address, Gandhi's articles published in the Harijan and Dr. Ambedkar's reply are published in Annihilation of Caste (3rd ed.), 1987.

[3] Quoted in Rev. Dr. James Massey's paper, "Reflections and Remarks - Occupation and Descent-Based Discrimination: Identification of Affected Communities in Various Countries" presented at the Global Conference against Racism and Caste-Based Discrimination, New Delhi, March 2001.

[4] Mark Galanter, Competing Equalities - Law and the Backward Classes of India, 1984.

[5] See note 3 above.

[6] Mathew and Chacko, The Law on the Abolition of Untouchability. Indian Social Institute, New Delhi, 1996.

[7] See Human Rights Watch, Broken People: Caste Violence against India's "Untouchables", March, 1999.

[8] Broken Promises and Dalits Betrayed: Black Paper on the Status of Dalit Human Rights, National Campaign on Dalit Human Rights, 2000.

[9] Professor Sukhadeo Thorat, "Hindu social systems and human rights of untouchables: Theory and Evidence on Violation", paper presented at the Global Conference against Racism and Caste-Based Discrimination, New Delhi, March 2001.

[10] In addition to the publications cited in the present report, organizations such as Human Rights Watch, Global Action for Dalits and the National Campaign on Dalit Human Rights have also received from individuals compilations of atrocities committed in various states.

[11] 1993 Cr. L.J. 1029.

[12] See Frontline, 26 February and 12 March 1999.

[13] Robert Knox, An Historical Relation of Ceylon, 1681.

[14] Ryan, Caste in Modern Ceylon, 1953, p. 17.

[15] A.P. Kannangara, "The Rhetoric of Caste Status in Modern Sri Lanka" in Peter Robb, Society and Ideology, 1995.

[16] M.D. Raghavan, Handsome Beggars - The Rodiyas of Ceylon, 1957.

[17] Michael Banks, "Caste in Jaffna" in Aspects of Caste in South India, Ceylon and North-West Pakistan, E.R. Leach (ed.), 1960.

[18] Suntharalingam vs. Herath 72 NLR 54, 74 NLR 457.

[19] Report of Nepal under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/337/Add.4), para. 22, May 1999.

[20] International Movement against All Forms of Discrimination and Racism (IMADR), History of Buraku Discrimination in Japan, 2001.

[21] See an account of the laws in Emily A. Su-lan Reber, "Buraku Mondai in Japan: Historical and Modern Perspectives and Directions for the Future", Harvard Human Rights Journal, vol. 12 (1999), p. 298.

[22] In general see also Kenzo Tomonaga, "A Critique Based on the Present State of Discrimination Against Buraku People" in the Counter-Report to the Fourth Periodic Report by the Government of Japan (Buraku Liberation and Human Rights Research Institute 1998).

[23] This account is based on Frederick Barth, "The System of Social Stratification in Swat, North Pakistan" in Leach, op. cit.

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**PREVENTION OF DISCRIMINATION**

**Prevention of discrimination and protection of indigenous peoples**

# Report of the Working Group on Indigenous Populations on its nineteenth session

Chairperson-Rapporteur: Ms. Erica-Irene Daes

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## Introduction

### Mandate

1. The creation of the Working Group on Indigenous Populations was proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 2 (XXXIV) of 8 September 1981, endorsed by the Commission on Human Rights in its resolution 1982/19 of 10 March 1982, and authorized by the Economic and Social Council in its resolution 1982/34 of 7 May 1982. In that resolution the Council authorized the Sub-Commission to establish annually a Working Group to meet in order to:

(a) Review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually from Governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status, particularly those of indigenous peoples, to analyse such materials, and to submit its conclusions and recommendations to the Sub-Commission, bearing in mind inter alia the conclusions and recommendations contained in the report of the Special Rapporteur of the Sub-Commission, Mr. José R. Martínez Cobo, entitled "Study of the problem of discrimination against indigenous populations" (E/CN.4/Sub.2/1986/7 and Add.1-5);

(b) Give special attention to the evolution of standards concerning the rights of indigenous populations, taking into account both the similarities and the differences in the situations and aspirations of indigenous populations throughout the world.

2. Due to its comprehensive terms of reference, in addition to the review of developments and the evolution of standards, which are separate items on the Working Group's agenda, the Working Group has over the years considered a number of other substantial issues relating to indigenous peoples. In the light of the recommendation made by the Working Group at its seventeenth session (E/CN.4/Sub.2/1999/19, para. 194), the following items were added and included in the provisional agenda for the nineteenth session: Review of developments - general statements, including land issues, education and health; standard-setting activities, including a review of indigenous peoples' relationship with natural resource, energy and mining companies; International Decade of the World's Indigenous People; World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance; and Other matters. The principal theme of the nineteenth session was: "Indigenous peoples and their right to development, including their right to participate in development affecting them".

3. In its resolution 2000/14, the Sub-Commission requested the Secretary-General to prepare an annotated agenda for the nineteenth session of the Working Group.

# I. ORGANIZATION OF THE WORK OF THE SESSION

## A. Attendance

4. In its decision 2000/119, the Sub-Commission decided on the following composition of the Working Group at its nineteenth session: Mr. Miguel Alfonso Martínez, Ms. Erica-Irene Daes, Mr. El-Hadji Guissé, Ms. Iulia Antoanella Motoc and Mr. Yozo Yokota. The session was attended by Mr. Alfonso Martínez, Ms. Daes, Mr. Guissé, Ms. Motoc and Mr. Yokota. They were joined by Ms. Leila Zerrougui, member of the Sub-Commission, and Ms. Christy Mbonu, alternate member of the Sub-Commission.

5. The Working Group was attended by representatives of 33 Member States, five United Nations bodies and specialized agencies and 271 indigenous and non-governmental organizations. A total of 1,033 persons attended the nineteenth session of the Working Group. The list of participating States and organizations is contained in annex I.

## B. Documentation

6. A number of documents were made available for the nineteenth session of the Working Group. The full list of the documentation is available in annex II of the present report.

## C. Opening of the session

7. Ms. Stephanie Grant, representative of the Office of the High Commissioner for Human Rights, opened the nineteenth session of the Working Group on Indigenous Populations. She welcomed the participants and noted that the Working Group was the principal meeting place for the world's indigenous peoples. She expressed support for the main theme on indigenous peoples and their right to development, including the right to participate in development affecting them, and drew attention to the ongoing work of the Working Group on the Right to Development of the Commission on Human Rights. She also referred to the creation and importance of the Permanent Forum on Indigenous Issues which, she emphasized, was an institution of fundamental importance to indigenous peoples. She concluded by wishing the participants a successful meeting.

## D. Election of officers

8. Ms. Erica-Irene Daes was elected Chairperson-Rapporteur at the first meeting of the nineteenth session by acclamation. Her nomination was proposed by Mr. Miguel Alfonso Martínez and supported by all the other members of the Working Group.

9. In her opening statement, the Chairperson-Rapporteur welcomed the participants to the nineteenth session of the Working Group. She also extended her welcome to the newly appointed Special Rapporteur on the Situation of human rights and fundamental freedoms of indigenous people, who would be in Geneva for the week to hold consultations with delegations. She announced that she planned to retire as Chairperson-Rapporteur of the Working Group and

that she did so with great sadness. She said that she believed progress had been made and she referred to a number of achievements made during her 18 years of chairmanship, emphasizing in particular the creation of the Permanent Forum. She noted that the Working Group had initiated a new form of constructive dialogue between indigenous peoples and Governments. She conceded, however, that much remained to be completed. She expressed concern that the draft United Nations declaration on the rights of indigenous peoples had languished in the working group of the Commission. Member States that did not support the draft declaration and indigenous persons who delayed the progress of its consideration were doing a great disservice to the United Nations and the international community. The Chairperson-Rapporteur referred to the great changes that had taken place since the first session of the Working Group, in particular the ending of the cold war. However, she pointed to new aggressions on indigenous peoples, in particular arising from increased foreign investment and environmental damage. She welcomed some of the work of the United Nations agencies that were now more active on indigenous issues. She noted the importance of protecting indigenous traditional knowledge and intellectual property. Referring to the Convention on Biological Diversity and the International Convention on the Elimination of All Forms of Racial Discrimination, she noted the importance of their full and effective implementation. She stressed the importance of an independent, well-resourced, full-time secretariat which would also include experienced indigenous persons and emphasized that this would be vital to the success of the new Permanent Forum on Indigenous Issues.

10. At the request of the members of the Working Group, the secretariat made the text of Ms. Daes's speech available to participants.

### E. Adoption of the agenda

11. At its first meeting, the Working Group considered its agenda on the basis of the provisional agenda (E/CN.4/Sub.2/AC.4/2001/1).

12. A recommendation was made by Mr. Alfonso Martínez that the words "including the participation of the world's indigenous peoples at the Conference" be added at the end of agenda item 7. The amendment to the provisional agenda was agreed upon.

13. Mr. Kenneth Deer, on behalf of the Mohawk nation, asked that time be reserved on Friday afternoon to allow indigenous peoples to thank Ms. Daes formally for her outstanding work.. Ms. Motoc supported this request.

14. The provisional agenda as amended was adopted.

15. The Working Group held nine public meetings during its nineteenth session, of which one was an extended meeting.

### F. Adoption of the report

16. The report of the Working Group on Indigenous Populations on its nineteenth session was adopted on 8 August 2001.

## II. REVIEW OF DEVELOPMENTS PERTAINING TO THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLES: INDIGENOUS PEOPLES AND THEIR RIGHT TO DEVELOPMENT, INCLUDING THEIR RIGHT TO PARTICIPATE IN DEVELOPMENT AFFECTING THEM

### The concept of development

17. Under item 4 of the agenda, there were 117 oral statements. Many participants called for the incorporation of indigenous views and values into the concept of development. Similarly, indigenous knowledge and traditions should be taken into account in the planning and implementation of development projects. The notion of development should thus be based on a balance between Western or mainstream and indigenous views of development.

18. Mr. Alfonso Martínez noted that four basic questions were crucial to indigenous peoples' right to development, all of which were closely linked to the right to self-determination. Firstly, it would be fruitless to talk about development without taking into account indigenous peoples' own ideas and concepts of development. Secondly, an equitable and just solution to the issue of indigenous ancestral lands and natural resources (including water) must be found. Thirdly, indigenous peoples should have the right to freely enjoy their resources without authorization from others, and finally, there should be absolute respect for the decisions of indigenous peoples in regard to these matters.

19. Mr. Yokota stated that the notion of development should take into account the development, in all its dimensions of indigenous peoples themselves, both individually and collectively. He noted that, although the UNDP Human Development Index (HDI) constituted a very comprehensive approach to development, it was based on the individual enjoyment of rights within a given country and as such provided a basis on which to compare development between countries. He suggested that an HDI should be conceived in relation to identifiable indigenous peoples, so that the level of human development of indigenous peoples could be compared to the average HDI of countries. This would form a basis for the identification of solutions to fill the gap between the HDI of indigenous and non-indigenous peoples. The expert also said that he recognized that the notion of development of Governments and international institutions such as the World Bank and the International Monetary Fund was problematic for indigenous peoples. The rights of indigenous peoples should be carefully taken into account when planning national development programmes.

20. A representative of the Kanaky People of New Caledonia stated that the Western interpretation of development was based on the colonialist premise that development is equal to achieving Western civilization. He felt that his people were being forced to adopt the Western way of life, which was alien to Kanaky culture and identity. An appropriate model of development should be based on Kanaky needs and values.

21. Mr. Guissé expressed concern about the imposition of a Eurocentric approach to development on the rest of the world. Diverse approaches and perspectives should be applied in order to avoid imposed forms of development.

22. Several representatives of the Maya people in Guatemala stressed the importance of spirituality as the basic principle guiding indigenous peoples. It helped them to understand respect for all life and how to value communal efforts. To them, development meant having access to sacred sites so that an equilibrium could be reached with the Ajau (he who gives life), with nature, and with the ancestors. Development could be reduced to the exploitation of others, but rather should consist of solidarity and helping others. One representative underlined the importance of taking into account the values of indigenous women and the needs of indigenous youth and children.

23. A representative of the Maasai people of Kenya explained that to pastoralist communities, land was the basis for all kinds of development and production. Therefore, development must ensure the conservation and sustainable use of land, water and natural resources. Development must be relevant to the needs of people. The Maasai people knew how to achieve this type of development in their region, based on land, education for empowerment, and a peaceful environment. Their development needs were education, food, water and land rights, and securing the indigenous pastoralist resource base.

24. Ms. Motoc stated that indigenous peoples should not be regarded as obstacles to development, but be accepted as a part of the diversity of humanity and the wealth of humankind. Development that violated the rights of indigenous peoples had been labelled "aggressive development" by NGOs. She suggested that the Working Group should undertake a study on the relationship between development and indigenous peoples.

**Human rights and the right to development**

25. Indigenous representatives, governmental delegates and members of the Working Group all reiterated the importance of the indivisibility of human rights, and that all human rights were an integral part of the right to development. A number of interventions recalled article 1 of the Declaration on the Right to Development of 1986, which stated that "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized".

26. A number of representatives stated that denying human rights and the right to development to indigenous peoples stemmed from racist and discriminatory attitudes that pervaded government agencies. In that respect, the Grand Chief of the Grand Council of the Crees of Quebec stated, inter alia, that article 1 of the Declaration on the Right to Development was predicated directly and explicitly on the International Covenant on Civil and Political Rights. It followed that since indigenous peoples enjoyed the right to self-determination under the Covenant, as determined by the United Nations Human Rights Committee which had the specific mandate to interpret the Covenant, then indigenous peoples had all the rights and protections contained in the Declaration on the Right to Development. Indigenous peoples were not simply another social group affected by development policy. They were imperilled, and it was their very existence which was threatened by development. Also, they were the owners of the land and its resources and would therefore control development in their lands.

27. The representative of the World Sindhi Congress of Pakistan discussed a number of ongoing human rights violations that impeded his people's right to development. Among them was the systematic suppression of indigenous culture and language which obstructed Sindhi children's education and the access to information of his people. Sindhi development was further threatened by religious intolerance and the violation of civil rights.

28. Several representatives of the Amazigh people of North Africa stressed that the denial of basic human rights impeded development. They discussed violations of social, linguistic and cultural rights and how these impeded the successful integration of the Amazigh people in the overall development of the country. He appealed to the United Nations to encourage Governments in the region to stop the violent repression of his people.

29. A representative of the Comité Suisse de Soutien aux Chagossiens discussed the link between the right to identity and development. She pointed out that the right to development was a fundamental right that allowed each people to progress in the way it saw fit. The right to development could therefore not be exercised without the recognition of the right to identity. Like the colonial Powers had done before, the Government of Mauritius claimed that no indigenous peoples inhabited the Chagos Islands and that there existed only "Mauritians", thereby denying the Chagos people the right to choose their manner of development. The representative of Mauritius confirmed that in the view of his Government, there were no indigenous peoples in Mauritius but the Government had always been supportive of its Illois-Chagossien minority.

30. Representatives from various indigenous organizations underlined the importance of basic services such as fresh drinking water, health and education for indigenous peoples necessary to achieve the right to development.

**Participation in development and democracy**

31. Mr. Yokota stressed that indigenous peoples should participate in development, on three levels. First, their participation should be meaningful and effective. Secondly, indigenous participation should be ensured in all phases of development, from planning the projects to sharing the benefits. Finally, indigenous participation should be ensured in national development programmes, including those that might not affect them directly. The incorporation of indigenous ideas and experiences would lead to more acceptable development programmes for the whole country.

32. Many indigenous representatives stated that their lack of representation in Government was one of the main obstacles to indigenous participation in development. For example, representatives of the Ogiek people of Kenya and of the Batwa people in Rwanda spoke of the difficulties of effective minority participation in a majority-based democratic system. Because of their small numbers, Ogiek representatives could not be elected to parliament. A similar situation existed for the Batwa. The absence of representatives in Government precluded indigenous participation in the decision-making process and in development planning.

33. The representative of the Dabalorivhunwa Patriotic Front pointed out that in governmental systems where the majority effectively ruled over the minority, the domination of the cultural majority often led to the assimilation or disappearance of minorities, or indigenous peoples. He therefore stressed the importance of just and proportionate representation of all groups throughout the political system.

34. A number of indigenous representatives regretted the lack of recognition and resources from Governments for their community institutions, which could otherwise play a crucial role in ensuring that community decisions were taken into account in all stages of development programmes.

35. The representative of Canada stated that his country had made a number of efforts to ensure the participation of aboriginal people in development. In that regard, he mentioned the participation of indigenous people on environmental assessment and regulatory boards and in land claim settlement agreements, which provided for land, financial resources and agreed access to natural resources, and various forms of self-government. He discussed a number of initiatives on both the national and international levels such as the establishment of the Arctic Council and the development of a regional partnering approach to increase the opportunities for indigenous peoples to become employed in the industries that were active in the north of Canada.

36. The representative of New Zealand discussed the policy of her Government to ensure the participation of the Maori in development affecting them. She discussed the role of the Ministry of Maori Affairs, which had responsibility for elaborating government objectives in Maori development and coordinating the collaboration of Maori communities and other government departments. One programme currently being implemented, the Capacity Building programme, was geared towards assisting whanau, hapu, and iwi Maori communities to identify needs and develop initiatives to achieve long-term economic development.

37. The representative of Chile mentioned two specific efforts of his Government to ensure the participation of indigenous peoples. Firstly, he noted the importance of the Indigenous Law of 1993 which, for the first time in Chilean history, recognized the existence of eight indigenous peoples of that country. The institution created by the Law, the Directorate of the National Corporation of Indigenous Development (CONADI), was made up of representatives from relevant ministries and eight indigenous representatives, who thereby had the chance to influence government policy directly. Secondly, he discussed the Programme for Comprehensive Development of Indigenous Communities which had four main components: the financing of economically productive initiatives aimed at raising the standard of living, health services that combined traditional and occidental medicine, intercultural bilingual education aimed at strengthening ancestral culture and, finally, strengthening of indigenous communities and capacity-building of civil servants working with the indigenous population. The participation of indigenous peoples in designing and implementing these policies was ensured by their representation in local, provincial and national bodies and committees.

**Self-determination, self-development and the right to land**

38. The representative of the National Aboriginal and Torres Strait Islander Legal Services Secretariat Limited of Australia noted that sustainable development was only possible

through the recognition of the right to self-determination for indigenous peoples. The right to self-determination, as was repeatedly emphasized in a large number of interventions, was strongly linked to the right of indigenous peoples to decide on their own development and to have control over their land and resources.

39. The statement presented on behalf of the indigenous caucus called for common article 1 of the International Covenants on Human Rights to be applied to indigenous peoples. Article 1 recognizes that all peoples have the right to self-determination and that they may freely dispose of their natural resources. The statement, like many other interventions, stressed the importance of the links between self-determination and the right to land for indigenous peoples' development and their cultural survival. The indigenous approach to self-development was based on the principles of respect for and preservation of land, natural resources and all elements of the natural environment; consensus in decision-making; mutual respect for peoples' values and ideology, including sovereignty over land, resources and the environment under natural law.

40. The representative of the Indian Law Resource Center argued for the recognition of indigenous peoples' right to permanent sovereignty over their natural resources. The principle that peoples and nations must have the authority to control and enjoy the benefits of the development and conservation of their natural resources had emerged in modern law after the Second World War and in the context of decolonization. The principle therefore applied to new emerging States and was a response to the inequitable situation that existed under colonialism. Over 80 United Nations resolutions dealt with this principle and its substance was incorporated in the draft United Nations declaration on the rights of indigenous peoples. There was a need to study this principle further with regard to indigenous peoples and the States where they were located. He argued that indigenous peoples were effectively colonized peoples in the economic, political and historic sense and suffered unfair and unequal economic arrangements typical of other colonized peoples. Indigenous peoples were entitled to the rights of self-determination and self-development and to exercise control over their natural resources, which belonged to them and had not been freely given up.

41. The representative of Spain discussed her country's Strategy for Cooperation with Indigenous Peoples which was formulated in 1997 and revised after consultations with indigenous peoples in 2001. The revision took into account the priorities of indigenous peoples as outlined in a final communication to the Government. These focused on the institutional strengthening and consolidation of indigenous organizations so as to ensure the formulation and implementation of their own strategies for development that were geared towards the defence and preservation of indigenous territories and natural resources, as these formed the basis for indigenous culture and identity.

**Implementation of national legislation and international treaties**

42. There was a general call for Governments to honour the treaties they were bound by and for the speedy adoption of the draft United Nations declaration on the rights of indigenous peoples. The failure of Governments to implement national legislation, international treaties or court decisions in favour of indigenous peoples' ownership over land or resources was mentioned by several participants. All noted that this effectively denied indigenous peoples their right to development.

43. The representative of the Ngatira Lands Trust Aotearoa of New Zealand discussed a number of cases in which the Treaty of Waitangi (the basis for the country's constitution) and court decisions in favour of indigenous peoples were not implemented. Several decisions of the Waitangi Tribunal in favour of Maori proprietary rights over land or rivers and that their rights had been violated and that they should be granted compensation were not accepted by the Government. She questioned the Government's ability and willingness to implement the right to development.

44. Several representatives of indigenous organizations from Canada discussed the lack of implementation of national and international legislation related to indigenous peoples' right to development. The representative of the Assembly of First Nations mentioned that the Human Rights Committee and the Committee on Economic, Social and Cultural Rights had expressed concern that the Royal Commission on Aboriginal Peoples' Recommendations had not been substantially addressed. He said that the lack of an adequate response on the part of the Government to Supreme Court decisions undermined indigenous youth's belief in the judicial system. A new trend towards negative rulings on aboriginal and treaty rights, was now eroding the possibility of using the Courts to clarify rights to land and resources.

45. The representative of Pagkakaisa Ng Aeta Ng Pinatubo Incorporated noted that for the first time in the Philippines, the rights of indigenous peoples had been embodied in national law, under the Philippine Indigenous Rights Act. This law incorporated four major rights: the right to ancestral domains; rights to self-governance and empowerment; social justice and human rights; and cultural integrity. This was a major step towards the recognition, protection and promotion of indigenous peoples' rights, including the rights to self-determination and development. However, he expressed concern that no clear policy had yet been developed to ensure the implementation of the new law.

**Militarization, conflict and military bases**

46. Those indigenous peoples confronted with conflict situations in their countries, particularly stressed the importance of peace as a necessary foundation for development. Conflict had led to the militarization of indigenous peoples' land in the Philippines, and indigenous representatives from the Philippines were concerned that the Government's preoccupation with the unification of political forces and the citizenry would mean that the implementation of indigenous peoples' right to development would not be given the requisite importance. The Maasai people of Kenya stressed the importance of conflict resolution programmes for achieving the right to development.

47. The representative of the Asian Buddhist Conference for Peace expressed concern that in spite of the signing of the Chittagong Hill Tracts Peace Accord in 1997, State-sponsored violence had continued with regard to development issues in the region. Development strategies based on road construction, pacification programmes and socio-economic development programmes, and immigration, remained in the hands of the military and the participation of indigenous peoples in the development process was excluded. He stressed that proper implementation of the Peace Accord could be a way to achieve development in all respects for the peoples in the region.

48. Many representatives stated that peaceful protest campaigns and marches that were organized in response to inappropriate development projects on their territories were violently repressed by their Governments with the help of the military and the police.

49. The Assembly of First Nations of Canada stated that the denial of the right to development for indigenous peoples could lead to conflict. For example, in one country, recent conflicts over fisheries had led government agents to use physical violence to subdue indigenous peoples carrying out a treaty-based fishery activity. The spiral of violence triggered by the failure of the Government to adequately address indigenous access to land and resources was leading to growing racial intolerance in many countries.

50. An indigenous representative of South Africa discussed the formation of a new indigenous body called the National Khoisan Consultative Council of South Africa, which was established to promote unity among the indigenous peoples of South Africa. One of its main goals was to establish a means for the resolution of land claims. Farmers of European descent were currently being subjected to "farm killings", and the looming conflict over access to land needed to be resolved effectively through recognition of indigenous land rights. Social upheaval would be the result of unresolved land issues.

51. The representative of the Association of Indigenous Peoples in the Ryukyus spoke of the practical problem of unexploded bombs throughout the islands of Japan, and other related problems. The bombs continued to cause death and injury in Okinawa, particularly during land development efforts.

52. The representative of the Inuit Circumpolar Conference expressed concern about the consequences of the United States National Missile Defense (NMD) strategy on indigenous peoples of the Arctic, as the strategy would involve the creation of military infrastructure in several places across the Arctic. The Inuit had developed, through their Principles and Elements for a Comprehensive Arctic Policy, a number of statements about peace, disarmament and development. NMD would create fear and inhibit the development of peaceful relationships around the world.

53. The representative of the World Sindhi Congress explained that three quarters of Pakistan's budget went into defence-related activities, thereby precluding investment in sustainable development projects.

**Private sector development/impacts**

54. Several indigenous representatives from the north of Russia discussed their peoples' dependence on a fragile ecosystem. They saw their traditional economy threatened by the disruption caused by railways and roads which undermined reindeer hunting and caused erosion and silting of the rivers, which in turn harmed fishing. Agreements with multi-national corporations often were not respected, and mining companies entered their territory without the prior consent of traditional landowners. Partnerships with these companies tended to be geared more towards ensuring their peoples' survival rather than development.

55. The construction of hydroelectric power dams was repeatedly cited as inappropriate development implemented by Governments. In Japan, the building of a dam in Nibutani, land sacred to the Ainu people, had a severe impact on the community on several levels. The dam led to flooding and erosion, thereby destroying traditional agriculture. The change of the water temperature in the river caused fish to become extinct while places with useful wild plants, as well as sacred ceremonial sites, were submerged. The links between the Elders and the young were destroyed and, as poverty forced families to sell their land to the Government, divisions in the community were created. The representative of the Ainu Association of RERA stressed that indigenous peoples should be able to determine their own course of development.

56. The representative of the Zo Reunification Organization stated that the building of the Kaptai dam by Pakistan resulted in the inundation of over 40 per cent of the arable tribal valley lands in the Chittagong Hill Tracts. Over 100,000 indigenous people had lost their ancestral land and nearly half of them had become displaced. He stated that hydroelectric dams, logging and the destruction of jhum cultivation were all part of the modern development process. He regretted that government policy reflected concern for the preservation of wildlife and the environment but failed to address the basic human values of the Zo people. Sustainable development, he said, could not exist without the protection of indigenous people.

57. The representative of the Centre for Organisation Research and Education (CORE) expressed concern about the building of 25 hydroelectric dams in India, threatening the indigenous people of Manipur. Like other speakers on the issue of dams, he stated that neither pre- nor post-impact assessment studies had ever been carried out, that these projects were implemented without the consent of the people most affected by them, and that the people did not receive any benefits.

58. The mining and logging activities of transnational corporations were said to have an extremely negative impact on the environment on which indigenous peoples depended for their development. Moreover, transnational cooperations were often cited in connection with multiple violations of the rights of indigenous peoples. A number of indigenous representatives voiced the need for a code of conduct for transnational corporations.

59. The representative of the Siocon Subanon Association of the Philippines made a statement concerning the negative impact of mining activities on indigenous territory. He stated that in spite of agreements between the Government and indigenous organizations, a Canadian mining company, Toronto Ventures Inc. (TVI), had occupied their land against their wishes, in violation of the principle of prior and informed consent that was upheld in a number of Philippine laws. The company had militarized the land and set up checkpoints that regularly prevented farm products, food and other commodities, as well as people, from entering or leaving the area. This had not only obstructed indigenous trade activities, but had also delayed the building of a school and affected religious practices and health services. The mining activities had driven away animals, poisoned the fish and destroyed the local medicinal herbs. The company's activities constituted not development, but merely exploitation of the resources and people on the land.

60. A number of indigenous representatives stated that the creation of national parks or game reserves had forced their people off their land. For example, the Boran people of Kenya stated that four reserves in Isiolo had been annexed for this purpose, affecting important grazing and watering points previously used by pastoralists. The further extension of existing parks and the creation of new parks had led to the displacement of thousands of people and livestock in the region.

61. A representative of Ka Lahui Hawai'i expressed concern about the effects of the tourist industry. She stated that tourism had resulted in the dislocation of her people and in their increasing poverty. While the Government spent billions of dollars on the tourist industry, the Kanaka Maoli continued to suffer from overcrowded housing, poor health, homelessness and assimilation. In order to survive on their ancestral lands, people were forced to work at two or three jobs in the tourist industry. Multinational corporations enjoyed a greater degree of sovereignty than the indigenous peoples. Indigenous land had been offered to businesses by the Government. The Kanaka Maoli needed to be given the ability to develop their own education system, system of justice and sustainable development model. She expressed grave concern about the ongoing militarization of her people's traditional lands by the United States military.

**Globalization**

62. Many indigenous representatives expressed concern about the negative impact of the process of globalization on their peoples. The Indigenous Peoples Caucus defined globalization as "the integration of trade, finance and information that is creating a single economy". This process had had a detrimental impact on indigenous peoples as it often carried with it the weakening of environmental regulations, an increase in unemployment, cuts in spending on education and health services and a widening of the gap between the rich and the poor.

63. Mr. Guissé stressed that globalization, transnational companies and related structures were ruled by interests that were directly opposed to those of indigenous peoples. Their power base was in the North, never in the South. Several other speakers noted that globalization reinforced the imbalance of power in favour of the North, and therefore strengthened those interests that threatened indigenous peoples.

64. The representative of Unesco Extea pointed out that the recent surge of the information society had resulted in a new gap between info-poor and info-rich people. Even though communication technology had the potential of fostering a more linked and democratic society, at the moment it put indigenous people in an even weaker position as they remained excluded from its benefits.

**Sustainable development and indigenous enterprises**

65. The representative of the Khakas people spoke of the rebirth of his people's traditions and culture. The cultural renaissance, however, was poorly funded and continued development required access to resources, including access to the benefits of the development on traditional lands. The need for financial resources to support the implementation of sustainable development projects was repeatedly mentioned.

66. A representative of the Mayan people of Guatemala spoke of the worsening situation of indigenous children in his country. His organization, OTM Niños Mayas - Consejo Tukum, had set up a project, "Árboles de la Tempestad de 1999" for the Mayan children. The timber destroyed in the 1999 hurricane was turned into works of art by artists from all over the world, and sold to finance the project. He requested further support from Governments, international organizations and NGOs. He stated that the project was an excellent example of the indigenous interpretation of development, combining the spiritual with the material.

67. A representative of the First Nations Business Teaming Group (FINBARR), in cooperation with Broken Arrow Neutral Deminers (BAND), said that his organization could train indigenous people to become skilled technicians and operate sophisticated landmine detection equipment. The project would enhance and support sustainable community development with a strong economic base. He expressed hope that the United Nations would support the indigenous initiative for the elimination of landmines.

68. The representative of Aboriginal Business Leaders and Entrepreneurs, a Canadian organization, explained that his organization was working to strengthen indigenous markets and revitalize traditional trading relationships. He announced that an International Indigenous-to-Indigenous Trade Summit would be held at Winnipeg, Canada, from 7 to 9 May 2003, and invited the participants to the Working Group to attend the meeting.

69. A number of organizations mentioned the possibility of ecotourism as a means of attaining sustainable development.

**The role of international agencies and bodies**

70. There was general agreement that international organizations should ensure the participation of indigenous peoples in their development activities. The World Bank and United Nations agencies were repeatedly urged to design policies that directly assist indigenous peoples in development on their territories, and to involve them in all stages of development projects.

71. The representative of UNDP stressed the importance of partnerships among development actors. She stated that indigenous peoples had a critical role to play in maintaining, enhancing and promoting sustainable models of development. Partnerships with indigenous peoples were the key to preventing and resolving conflict, enhancing democratic governance, reducing poverty and sustainably managing the environment. The new UNDP policy on indigenous peoples would be launched at the World Conference against Racism. The policy had three objectives: to integrate indigenous perspectives into future UNDP policies, programmes and projects that affected them; to make indigenous peoples' concerns a cross-cutting issue within UNDP's areas of work; and to support indigenous peoples' initiatives, networking and capacity so that their perspectives were brought to bear in key human development processes and outcomes. Five thematic priority areas had been identified: democratic governance, poverty reduction strategies, crisis prevention and recovery, environment and sustainable energy, support and development of cultural revitalization. Finally, she expressed UNDP's full support for and recognition of the Permanent Forum on Indigenous Issues.

72. The representative of UNESCO stressed the need to rethink development from a multicultural perspective, based on diversity and peaceful interaction among cultures. Respect for cultural diversity and cultural identity was the motor, if not the essence, of sustainable development and was of capital importance for indigenous peoples. The loss of cultural identity often put indigenous peoples in a cultural and psychological vacuum and therefore constituted an obstacle to their social and human development. UNESCO therefore had a role to play in promoting the participation of indigenous peoples in the formulation of national cultural policies, particularly with regard to cultural rights. The organization had as its goal to ensure access for indigenous peoples to a multicultural society, and to develop integrated activities to reduce poverty. New information and communication technologies were central to these efforts, as they could be a means of spreading indigenous knowledge, traditions, language and culture. UNESCO was currently preparing a draft declaration on cultural diversity that would be submitted for approval at the thirty-first session of its General Conference.

73. Many indigenous representatives expressed criticism of the policies of international trade and lending agencies such as the World Trade Organization, the World Bank and the International Monetary Fund. A representative of the Deboin Peoples Foundation Inc. of Papua New Guinea expressed concern that WTO rules limit the capacity of Governments to regulate international trade. Free trade agreements might, for example, prohibit trade measures such as controls on endangered species or bans on tropical timber exports. She also stated that development projects or structural adjustment programmes imposed on Governments by the World Bank or IMF effectively took away peoples' choice or their right to development.

74. The representative of the World Bank stressed the need to strengthen cooperation and collaboration with indigenous peoples. He recognized that certain development activities in the past had had negative impacts on indigenous peoples such as involuntary resettlement, restricted access to natural resources and violations of basic human rights. He stated that the World Bank was fully committed to addressing the poverty and voicelessness of indigenous peoples in four ways: by financing development projects which benefited them, by engaging in policy dialogue with borrower Governments and other stakeholders, by applying safeguard policies, and by building a knowledge base on development issues to be shared with stakeholders. Finally, he stated that the World Bank would like to take the opportunity of the Working Group to receive feedback on the World Bank's work on indigenous peoples and on its draft indigenous peoples policy.

75. The Indigenous Peoples Caucus noted a positive development in the publication of the World Commission on Dams report *Dams and Development: A New Framework for Decision-Making*, that was published in November 2000. In the report, the WCD recommends the promotion of free and prior informed consent of indigenous peoples to projects affecting them.

76. The Caucus also expressed appreciation of the adoption of a resolution on indigenous peoples by the Council of Ministers for International Development of the European Union. The resolution acknowledged indigenous peoples' right to self-development, recognized diverse concepts of development and the right of indigenous peoples to object to development projects on their lands.

77. The representative of Switzerland expressed strong support for the Permanent Forum on Indigenous Issues. He stated that that body, made up of an equal number of government and indigenous representatives, would have a crucial role to play in promoting dialogue between the two parties by providing a forum for the discussion of ways to realize the right to development. He stressed that Switzerland hoped that the Forum would be established in Geneva, where it would benefit from the numerous arrangements that were already in place to support indigenous peoples. He considered the establishment of the Forum to be a concrete example of follow-up to the 1993 World Conference on Human Rights, which encouraged the international community to promote effective international cooperation to realize the right to development. The Government was convinced that close cooperation between the Forum and the Working Group was very important in realizing the right to development of indigenous peoples, including their right to participate in development affecting them.

78. The representative of the Lumbu Indigenous Community Foundation stressed the importance of the young people of indigenous communities and the central role they played in development. He therefore expressed support for all strategies that empowered the young and strengthened the network among them, such as world indigenous youth conferences.

## III. REVIEW OF RECENT DEVELOPMENTS PERTAINING TO THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLES: GENERAL STATEMENTS, INCLUDING LAND ISSUES, EDUCATION AND HEALTH

79. Under item 5 of the agenda, there were 104 speakers. The Chairperson of the Torres Strait Regional Authority spoke of the progress of the Torres Strait Islanders. The Regional Authority was established in 1994 and the lives of the people had improved greatly since. The people of the Torres Strait Islands still strove for more autonomy and were negotiating directly with the Commonwealth and Queensland governments. The representative also spoke of the need to secure greater control over sea resources. Non-indigenous commercial fishing interests were exploiting the natural resources that were the sea rights of the Torres Strait Islander peoples and his people were moving to reclaim those rights, both for subsistence fishing and for possible commercial ventures.

80. The representative of the Working Group on Indigenous Minorities in Southern Africa described the conditions of the San community in South Africa. In 2000 the Government announced that 20,000 San had to be resettled away from their traditional lands. He said that almost half of the total land (44 per cent) in Namibia was in the hands of private landholders. Land inequality and land allocation were thus of special importance to the people who lived in communal areas. Two thirds of the people of Namibia (900,000) shared 41 per cent of the land. Only a small proportion of Namibia's San community, which numbered approximately 38,000 people, retained management rights to their ancestral lands. The vast majority of San, though still residing on the land of their ancestors, had been dispossessed of their natural resources and now resided on land managed by other people.

81. The representative of the ILO provided information on the ratification and implementation of ILO Convention Nos. 107 and 169. Three new indigenous staff members had been employed full time to work on indigenous issues. She expressed the hope that more United Nations bodies would follow the lead of ILO, and urged all States to review critically the way they treated indigenous and tribal peoples.

82. The representative of the Metis nation of Alberta spoke of the need for more Governments to attend the Working Group. She drew attention to indigenous health issues such as diabetes, which was an increasing problem for aboriginal peoples in Canada. Metis and other aboriginal children in Canada were suffering from many ailments, including AIDS, foetal alcohol syndrome and alcohol and drug dependency syndromes. Depression and suicide were becoming epidemic among children and youth. This situation was due to families being compelled to live on settlements and reserves, alienated from their traditional natural and social environments. The impact on indigenous peoples, particularly children and women, was considerable, leading to physical, social, emotional and spiritual illness.

83. The representative of the Fund of the Seventh Generation spoke of sacred sites and their importance to indigenous peoples. Access to the sites was often difficult, as the traditional people no longer owned their own land. Lands were being legislated out of indigenous control. Since there was no clear legal definition of what a sacred site was, the sites were often commercially exploited. She said that indigenous peoples were also victims of religious intolerance.

84. The representative of Hmong International Human Rights Watch said that the Hmong people were refugees scattered across two countries. She accused the Lao Government of continuing military transgressions and other human rights violations against the Hmong people, including arbitrary detentions and killings. She said that the Lao Government was forcibly relocating Hmong people to Viet Nam. The representative asked the High Commissioner for Human Rights to address the on-going human rights abuses faced by the Hmong, and requested the Lao and Vietnamese Governments to withdraw their troops from the Saysomboun Special Zone where Hmong refugees were currently in danger.

85. The representative of Canada said that his country was eager to address past grievances and current disadvantage. Comprehensive land claims were being processed, and he referred to the Labrador Inuit Land Claims Agreement in Principle in that regard. Canada was pursuing the recommendations of the recent report, "Strengthening Aboriginal Participation in the Economy". Canada believed that addressing aboriginal issues was a long journey but vital for the whole of Canada.

86. A representative of the Indian Movement "Tupaj Amaru" spoke of the violations of human rights of the indigenous peoples in the Andean countries. He said that the Bolivian Government had opened the economy to multinationals such as mining companies that exploited the traditional lands of indigenous peoples. Government officials continued to intimidate indigenous peoples; his own human rights documents had been taken from him by government officials when he was leaving the country to attend the meeting.

87. The representative of the Santhal Adivasi people of the province of Jharkhand of India spoke of the exploitation of their traditional forests by mining interests. Development projects such as dams continued to cause massive pollution and displacement of people. In the last 50 years the Supreme Court of India had given a favourable judgement for the Adivasi only once. The so-called Samanta judgement confirmed that the provisions of the fifth Schedule of the Constitution must be respected (it states that Adivasi land cannot be bought by non-Adivasi). That decision, he said, was comparable to the Mabo case in Australia. He noted, however, that the Indian Government had plans to amend the fifth Schedule, and even the Constitution, which, left no protection for the indigenous peoples of India.

88. The representative of the Metis National Council recalled the statement by the representative of the Canadian Government at the Working Group in 1998 in which the Government affirmed the right of self-determination of indigenous peoples. He claimed that the Government no longer supported this principle. He believed that the Canadian Government continued to refuse to implement the recommendations of its own Royal Commission on Aboriginal Peoples.

89. The representative of the Komi People Revival Committee from Russia said that the Organization had achieved a lot in the last 10 years. Among other things, the Committee had worked with the Government to gain recognition and restoration of the language of the Komo people. In December 2000, a congress had been held with the Finno-Ugric people of Finland. Many of the problems faced by them were the same as the those of the Komo and solutions to the problems of the indigenous people of the north could be found together.

90. The representative of the World Coalition for Indigenous Children and Youth recommended that a workshop for indigenous children be held annually to provide a regular forum for the discussion of matters affecting indigenous children and youth, and that active and extensive youth participation be encouraged.

91. A representative of the Cactus Valley Red Willow Spring Sovereign Community of Big Mountain told the working group that since 2000, the Navajo people had been living under the jurisdiction of the Hopi Tribal Council and that violations of human rights had been increasing since then. She drew attention to intra-tribal conflict that she said could also be an obstacle to development.

92. The representative of the Nagatira Lands Trust Aotearoa informed the Working Group of recent developments concerning the Maori in Aotearoa. The Government of New Zealand had collected statistics that showed the gap in economic and social well-being between Maori and non-Maori people. Initially, the Government was planning to use those statistics to fund affirmative action projects within Maori communities. However, the Government had recently redefined its policy on "closing the gaps". She believed that the new policy portrayed the Maori as a group that was unable to achieve.

93. The representative of the International Organization of Indigenous Resources Development stated that the Canadian Government had recently undertaken a smear campaign to gain public support for a First Nations Governance Initiative, which took no account of indigenous institutions. He also mentioned the forthcoming General Assembly special session on

children and the document to come out of it, A World Fit for Children, and stressed the importance of the draft recommendations of this significant report being adopted and implemented.

94. The representative of the Indigenous Tribal Development Centre stated that illegal migration to their region in India was reducing the percentage of indigenous people to 30 per cent, resulting in the immigrants gaining a dominant position. This had led to an armed struggle, which was depicted as terrorism by the Government and treated as a law and order problem. No attention was being given to the rights of the indigenous peoples who were defending themselves and their right to self-determination. He also spoke of repression by the armed forces, even against women and children. He stated that the social and economic conditions of the indigenous peoples were much worse than those of the non-indigenous people, and called for the Government to revise its policies and legislation to change this situation.

95. The representative of the Juridical Commission for Auto-Development of First Andean Peoples (CAPAJ) made a statement concerning the Puna region of Peru. The representative spoke of the efforts of international organizations to implement international treaties (for example, to combat desertification) and government policies that continued to have a detrimental impact on the ecosystem. That had triggered demonstrations and protests by indigenous peoples in Bolivia and Peru, as no constructive dialogue seemed to be possible. In regard to ILO Convention No. 169, he noted that Chile had not ratified it, and in Argentina it had been ratified but without the political will to implement it.

96. The representative of the Consejo Nacional de Mujeres Costarricenses spoke of the need for indigenous peoples to have their own education and legal systems if they were to achieve development. Also, there was a need to have an open dialogue with the Government, ensuring that information reached their communities.

97. A representative of the Association of Indigenous Peoples in the Ryukyus told the Working Group about sexual crimes and violence committed against her people. She said that many sexual crimes went unreported when they happened to the indigenous peoples of Uchinanchu, even when the crimes were committed by servicemen from the United States of America. She accused the Japanese Governments of putting good relations with the United States before investigating crimes against indigenous peoples in Japan.

98. The representative of the Centre for Organization Research and Education (CORE) in India underlined the fact that many young indigenous persons were forced to join the armed forces of India as a means of survival, and that the suicide rate among indigenous people was dramatically high. She requested the High Commissioner for Human Rights to take action to investigate the conditions of all indigenous children in the world.

99. The representative of the International Indian Treaty Council stressed the fact that the gap between the health and well-being of indigenous peoples all over the world and the health of the majority of people was still growing, despite efforts by Governments and indigenous organizations.

100. The representative of WHO welcomed the establishment of the Permanent Forum on Indigenous Issues and the nomination of the Special Rapporteur and said that her organization looked forward to closely working with these two new mechanisms. She expressed concern th the health of indigenous peoples was still unsatisfactory and underlined the lack of adequate nutrition and culturally inappropriate health care which together translated into failure of the right to development for indigenous peoples.

101. The representative from the Mashantucket Pequot Tribal Nations expressed concern th the schools, hospitals and other institutions which should provide security for indigenous children have instead been a great threat to them.

102. The representative of the Naga Peoples Movement for Human Rights quoted a memorandum from the President of Indian civil society groups, stating "We in the rest of India can no longer escape the consequences of the military suppression of the Naga people, which throws away the nation's human and material resources and carries the real danger of the subversion of our democratic processes".

103. The representative of the Pacos Trust spoke of the land issues which affected the lives o the indigenous peoples of Malaysia. She reported that indigenous lands were still falling into t hands of non-indigenous persons, despite laws and regulations allowing indigenous persons to hold any type of land title. She said that even land belonging only to indigenous peoples was being conferred on non-indigenous people. Although measures had been taken by the Government to address this issue, the damage had already been done.

104. The representative from the Maa Development Association reported that Maasai human rights activists were not allowed to participate freely in the public affairs in Kenya. He stresse that the traditional lands of the Maasai people were still being taken by mainstream society for such things as farms and parks.

105. The representative of the Association of the Shor People stressed the importance of lan for indigenous peoples. He congratulated the Chairperson-Rapporteur for her report on land a requested that the report be sent to the Russian Government.

106. The representative of RAIPON said that the lives and the survival of the peoples of the north was directly linked to the land. He told the Working Group that all the forests in the nort of Russia belonged to the State Forest Management and that the indigenous peoples had to rent the forest from the authorities. The maximum period of time they could rent the forest was 45 years. He also said that the peoples of the north were now ecological refugees as they had had to leave their traditional lands because of pollution. He requested that a United Nations body be set up to negotiate land issues between indigenous peoples and Governments.

107. The representative of the Indian Law Resource Centre called for a new mechanism to review States' practices concerning indigenous lands and resources. He mentioned as an example that the United States Government could take the property of an Indian tribe without paying fair compensation, as it would have to do for non-indigenous landowners. She strongly recommended that a study be undertaken by the Chairperson-Rapporteur on permanent sovereignty over national resources.

108. The representative of the Action d'appui pour la protection des droits de minorités en Afrique centrale provided information about the conditions of the Pygmies in the Democratic Republic of the Congo, who had been uprooted from their traditional lands resulting in a loss of indigenous culture. The land had been given to private companies which were using the forest and the land in ways that would cause the Pygmies to disappear.

109. The representative of the indigenous peoples of Chukotka told the Working Group that her people, who numbered approximately 30,000 persons, were suffering because reindeer meat was no longer being bought for food. Alcoholism had become a big problem for the indigenous peoples of the north. She also spoke about the importance of the ecology for the indigenous peoples of the north. A gold mine had been opened near one settlement that had polluted the rivers and fields. Life expectancy for indigenous women in her area was only 43.1 years, and for men only 36.8.

110. The representative of the indigenous peoples of the Khabarovsk region said that her people were trying to save their language and culture. Tourism was becoming a bigger source of income for them.

111. The representative of Finland said that some progress had been made on land issues since an act was passed in 1995 that gave linguistic and cultural autonomy to the Saami people. Nonetheless, land issues were still the major area which needed to be addressed. He stressed that the conflicts between the Saami and other Finnish people were not between individuals but between two peoples who had lived together for a long time in the north of Finland. He congratulated Ms. Daes for the excellent work she had accomplished during her 18 years as Chairperson.

112. The representative of the Leonard Pelletier Defense Committee drew the attention of the Working Group to the case of the indigenous human rights defender, Leonard Pelletier, who had been in prison for more than 25 years. He said that Mr. Pelletier had been denied a fair trial and the right to bring new information to the courts, thus denying him his constitutional rights.

113. The representative of the Asociación Napguana said that land, health and education were important issues for the survival of indigenous peoples. He expressed concern about bilingual and intercultural education, which he believed threatened the cultures of indigenous peoples because the minority culture and the smaller language were vulnerable. His people should have responsibility for the education of their children so that their culture could be preserved.

114. The representative of the organization Tamaynut from North Africa talked about the protection of the human rights of his people. He said that the constitutions of the countries in North Africa did not recognize the languages and cultures of the indigenous peoples. As an example, he explained that in Morocco Berber associations were prohibited from holding meetings or gathering to discuss cultural issues. Participation in political life was limited and subject to strict rules. People often could not give traditional names to their children, which further eroded the indigenous culture. Another representative of the Berber people referred to the problems faced by them in Algeria, where the education rights of the Berber (or Amazigh)

peoples were ignored and their language, which was spoken by 40 per cent of the population, was not used officially in education or public life. Islamic fundamentalism was used as an excuse to suppress Berber identity, particularly the rights of Berber women and children.

115. The representative of the Association pour le développementTIGMI reported that present policies were reducing Berber lands and the Berber people to poverty. She said that her people had endured French and Arabic (Islamic) colonization. She argued that agrarian reform had been used as a means of reallocating Berber arable land to other sections of the population.

116. The representative of the Maluku Sovereignty Front (Indonesia) talked about land and self-determination. He said that the Indonesian Government had reacted very strongly against the Maluku people when they made claims for their rights to be recognized. He also said that Christian Maluku people were being forced to live like Muslims and that several villages across Maluku had been totally destroyed. The representative of the Alifura peoples also referred to the present situation in the Moluccas islands and called for an end to the ongoing military conflict with the Indonesians. Villages were being destroyed and mines being placed around the villages. She claimed that Indonesia's immigration policies were bringing in peoples from other parts of Indonesia.

117. The representative of the Comité de Solidaridad Triqui said that there was a link between education and development. He noted that the Government of Mexico had introduced educational reform but that indigenous peoples were absent from all consultations and planning. He said that high levels of illiteracy among indigenous peoples remained an obstacle to acquiring an education and participating in development; only 2 per cent of the population achieved higher education in Mexico.

118. The representative of the Yurrgonendi First Nations Centre from Australia said that education was important to break the unemployment and poverty cycle that indigenous peoples were trapped in. He also spoke about the need to preserve indigenous languages, knowledge and biodiversity. He said that sadly, in Australia it looked like only a few indigenous languages would survive in the long run.

119. The representative of the Ainu Association of Rera spoke about a conservative politician from Hokkaido who referred to Japan as "one nation with one language and one ethnicity". "The Ainu", he went on to say, "are now completely assimilated". She also told the Working Group that no domestic laws existed in Japan to address racial and ethnic discrimination, but the Ainu people would continue to demand their rights as indigenous people.

120. Mr. Yokota said that, in his opinion, Japan did not consist of one ethnic group. He also believed that the Ainu people were the indigenous people of Japan, and said that they had been subject to discrimination and marginalization. They should be included in Japanese society and that their religion, culture and language should be fully respected. He expressed regret at the pain caused to them by the views expressed by a small number of conservative politicians.

121. The representative of Mauritius referred to a statement by the Chagos inhabitants. She clarified the position of the Government in regard to sovereignty of the archipelago, and said that the Government had never given permission to Great Britain to move people in or out of the territory or to relinquish their claim over the territory.

122. The representative of the Cordillera Peoples Alliance spoke of the need for recognition of the land rights of indigenous peoples. She noted that mining companies and Governments continued to place the rights of mining companies above those of indigenous peoples. Victims of disasters caused by mining activities were not compensated and extractive industries rarely benefited the traditional landowners. She supported the recommendations of the World Commission on Dams and especially noted the recommendations related to indigenous peoples.

123. The representative of the Asociación Indigena Aymara San Bartolomé de Livilcar (Chile) noted that indigenous peoples needed to be involved in all development that affected them and not just parts of some projects. He called for Chile to ratify ILO Convention No. 169, to set standards for indigenous peoples and develop suitable domestic legislation to address law reform, education, health and other areas.

124. The Chairperson of the Aboriginal and Torres Strait Islander Commission said that the reconciliation debate in Australia had finished without a successful resolution. He said it was now time to move forward, and called for a treaty as the basis of relations between indigenous peoples and the Government.

125. The representative of the Tamal peoples of Nepal discussed the under-representation of his peoples throughout the public sector of Nepal. He said that exclusionary practices had been established during colonial periods and which had resulted in ongoing racism against indigenous and minority groups in Nepal.

126. The representative of Denmark said that she believed the Greenland Home Rule arrangement was a good example of indigenous autonomy and self-determination. There was an ongoing commitment by Denmark to promote indigenous human rights. Greenland had had home rule for 20 years. She referred to a commission that was examining forms of increased autonomy within the Danish commonwealth.

127. The representative of the Fédération des organisation autochtones de Guyane spoke against the French policy of assimilation of indigenous peoples. She noted that all schoolteachers taught only in French. She also raised concern about ongoing environmental degradation of her homeland due to the exploitation and unsustainable practices of the colonizers.

128. The representative of the Rendu indigenous peoples of Flores, in Indonesia, discussed the characteristics of the customary land rights and practices of his people and the non-recognition of their rights by the Indonesian Government. He drew attention to the construction of a giant dam, against the wishes of his people, which would flood their traditional lands.

129. The representative of Chile provided information about ongoing initiatives to address indigenous land issues. He called for more indigenous professionals and outlined initiatives in education.

130. The representative of Malaysia spoke about government initiatives and the policies of a multiethnic society in accordance with the Malaysian Constitution. He rejected statements from NGOs that claimed that some sections of society were excluded from policy and programme planning and development. He said that the Government compensated peoples displaced by national development.

## IV. STANDARD-SETTING ACTIVITIES, INCLUDING A REVIEW OF INDIGENOUS PEOPLES' RELATIONSHIP WITH NATURAL RESOURCE, ENERGY AND MINING COMPANIES

131. The representative of CAPAJ called for attention to the situation of the natural resources of the Aymara people, particularly the problem of water resources caused by dams and hydroelectric companies. Pastoral lands that were the only means of survival of peoples living in this area were being destroyed by a water development project. This project had not been subject to an environmental impacts assessment.

132. The representative of the Cactus Valley Red Willow Spring Community of Big Mountain lamented the devastation of the environment, life and culture of indigenous peoples in the Big Mountain area of Arizona caused by the energy plan of the United States Government. The energy plan agreed between the Hopi tribal governments and Peabody Western Coal Company contributed to the ecological and cultural destruction of the region. The representative called for an investigation into the mining activities of the Peabody Western Coal Company, which had damaged the health of indigenous peoples, destroyed irreplaceable religious shrines, ancestral graves/burial sites and other sacred areas, caused the decline of the aquifers and contaminated natural springs and vegetation; the mining had also caused forced relocation. It was further requested that the United States Government and the Hopi tribal governments, as well as the Peabody Western Coal Company, should recognize the General Assembly resolution on the protection of religious sites.

133. The representative of the Brazilian agropastoralist organization PRODECAP reported on the uranium mining activity in Niger that impacted negatively on the lives of indigenous peoples. He called for the international community and the WTO to make sure that all multinationals consulted with indigenous peoples about their development activities in indigenous land.

134. The representative of Philippines Indigenous Peoples Link reported that there were a number of projects being implemented by the Mines Minerals and Sustainable Development Project (MMSD) without the involvement of the wider constituency of all those affected by mining. With regard to the proliferation of voluntary codes of conduct, the representative was of the view that self-formulated and unregulated voluntary codes of conduct brought the standards-setting activity into disrepute. Further, such codes were not available in the languages of indigenous communities and were only available to Northern-based investors and NGOs, which indicated that companies' only concern was to pacify investors and NGOs and to isolate

communities from the networks of support that they often needed. He also reported on companies' activities that aimed at the removal of protective legislative frameworks and the introduction of liberalized access and financial incentives to speed up the penetration of indigenous territories by mining interests. With regard to prior informed consent, he reported on mining activities in the Philippines which violated Philippines laws in this regard. He also said that in order to secure false prior informed consent, the Government was using such tactics as ignoring existing community organizations and instead establishing indigenous organizations under the patronage of the company and the Government. This generated intense conflict, and the military and armed security groups were increasingly being used to intimidate and enforce. He pointed out that it was imperative for indigenous peoples to have access to independent information in order to be able to give their true prior informed consent. He concluded by suggesting that the Working Group should review the proliferating voluntary codes of conduct and work to promote standards that protected and promoted the rights of indigenous peoples, were backed by the force of law and provided for punitive damages for violations. He further requested that the Working Group pay attention to and report on the emerging standards based on precedent and existing legal instruments by which indigenous peoples and nations were seeking justice and reparations for the past and present abuses of mining and other corporations, including in the home countries of transnational corporations.

135. The representative of the Sarawak Peoples Campaign in Indonesia stated that the culture and identity of the Sarawak people were interconnected with the landscape and natural resources found on their traditional lands. State land and forest laws stemming from the colonial concept of *terra nullius* limited their access to their resource base. Their history and culture were being diluted and eliminated by mining and logging on their land. They called for assistance in seeking the Government's recognition of their particular relationship to land and resources and for protection from multinational corporations and the Government.

136. The representative of the Lakota Nation called for a study of the health effects of corporate hog farming in indigenous communities and further recommended that clear and definite health standards be set when corporate farms were built on indigenous lands.

137. The representative of the Tebtebba Foundation drew attention to several global policy initiatives relevant to indigenous peoples' rights and sustainable development focusing on water and energy development. The World Commission on Dams had carried out an independent global review of the development effectiveness of large dams and proposed criteria and guidelines for water and energy development. The role of indigenous peoples and other local communities affected by large dams and by other development projects were well reflected in its final report, referred to by other participants. The global review highlighted the disproportionate impacts on indigenous peoples of development programmes when their right to self-determination was ignored. The speaker requested the World Bank to reflect on the recommendations of the World Commission on Dams regarding indigenous peoples' free and prior informed consent and the need for resettlement programmes in a development mode to be included in the Bank's revised drafts of its policies on indigenous peoples and on resettlement. With respect to the upcoming world summit on sustainable development (Rio + 10), she recommended that OHCHR organize a workshop on indigenous peoples and sustainable development as one of the activities of the International Decade of the World's Indigenous People.

138. The representative of the World Conservation Union reported on a number of the Union's resolutions and recommendations concerning the rights of indigenous peoples. They include: (a) respect for indigenous peoples' rights over their lands, territories and natural resources in order to achieve sustainable development; (b) the adoption of methods of compensating indigenous peoples for damages caused on their lands or territories; (c) the effective participation of indigenous peoples in the agreements, implementation and monitoring processes, and legislative and administrative policies related to the exploitation of natural resources; and (d) the establishment of negotiating mechanisms between indigenous peoples, the State and other stakeholders in order to facilitate the resolution of conflicts that arise from the use or potential use of natural resources.

139. The representative of the Asia Indigenous Peoples Pact said that traditional ancestral lands were being taken away by the Government for building dams, military grounds, national parks, mines, recreation areas and the storage of nuclear waste. Indigenous peoples were forced to relocate from their land without reasonable compensation. The privatization policy of the Government had not only weakened their traditional land title, but had also led to the dissolution of the traditional community. Government agencies not only exploited the land, but also allowed business consortiums to exploit indigenous resources. He requested that, in accordance with the United Nations draft declaration on the rights of indigenous peoples, the Government return the traditional territory to the indigenous occupants and confirm their right to autonomy, self-management and the right to development based on indigenous traditions.

140. The representative of the Tallér de Historia Oral Andina reported on what mineral resources meant for the development of the Andean peoples and the disastrous effects of mining activities. He said that indigenous peoples did not have opportunities for development. They were being forcibly dispossessed of their natural resources through concessions to a company which is expected to be acquired by a transnational corporation. Indigenous peoples were massacred in order to take control of their land and the violators were not punished. He called for the Andean peoples' right to control their natural resources to be respected.

## V. WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

141. The Chairperson-Rapporteur introduced agenda item 7 and drew attention to the two papers that she had prepared for the World Conference on discrimination against indigenous peoples. She also advised that she would attend the Conference and continue to lobby for indigenous rights. She had proposed to the Executive Coordinator of the Conference that indigenous representatives address the plenary of the Conference on the first day and said that their active participation was vital to the Conference's successful outcome.

142. The representative of the Asociación Indígena de la Repúblic Argentina said that the lack of recognition of indigenous peoples as indigenous was a form of racism. Indigenous children and youth suffered from triple discrimination because of their age, indigenousness and poverty. Sex tourism and sexual exploitation impacted disproportionately on indigenous youth. Young people were over-represented in custody and detention. They also faced limited access to education and often that education was inappropriate.

143. The representative of the Indian Movement "Tupaj Amaru" saw a disparity in approaches to racism in poor countries and rich countries. Rich countries did not see a link between colonialism and racism. He also raised issues of participation.

144. The representative of Canada said that indigenous peoples were affected by racism and that the Government would like to see effective participation by indigenous peoples in the World Conference. The Government would try to ensure that the declaration and plan of action were relevant to indigenous peoples.

145. A representative of the Indigenous Caucus noted that in the draft documents being negotiated by the Preparatory Committee for the World Conference the term "indigenous peoples" bore a footnote. No other group was singled out in that way. He therefore recommended that the footnote be removed. He also referred to the statement of the indigenous millennium conference that called for a world conference on indigenous peoples.

146. The representative of the Saami Council believed that the preparations for the World Conference had excluded advice from indigenous peoples. She supported the statement of the indigenous millennium conference. She claimed that the only difference between indigenous peoples and other peoples was the non-recognition of their right of self-determination.

147. The representative of the Teton Sioux Nation Treaty Council said that racism took many forms, including laws that overrode treaties that had been "sealed with a prayer". That was a violation of natural law. If the World Conference was concerned only with individual racism then the collective rights of indigenous would again be ignored.

148. The representative of Chile reminded the Working Group that the World Conference provided an opportunity for everyone to look at themselves self-critically. He believed that the Conference had already made a major contribution to global thinking on indigenous peoples and their problems. A commitment was made in Santiago to ensure that the World Conference recognized the proposals from the Latin American region.

## VI. INTERNATIONAL DECADE OF THE WORLD'S INDIGENOUS PEOPLE, INCLUDING INFORMATION RELATING TO THE VOLUNTARY FUND FOR THE INTERNATIONAL DECADE OF THE WORLD'S INDIGENOUS PEOPLE AND THE REPORT OF THE ADVISORY GROUP

149. A representative of the OHCHR Trust Funds Unit reported on the activities of the United Nations Voluntary Fund for the International Decade of the World's Indigenous People. The Advisory Group of the Voluntary Fund had recommended for approval by the Secretary-General a list of 30 grants to projects of indigenous communities and NGOs for a total amount of US$ 252,000 (the names of organizations and amounts of the grants can be found in document E/CN.4/Sub.2/AC.4/2001/5). He also underlined that thanks to voluntary contributions the Fund was able to finance several programmes to be implemented by the

Indigenous Project Team of the Research and Right to Development Branch (RRDB) of OHCHR. The cost plan for 2002 amounted to a total of around US$ 415,000 for project grants to indigenous organizations and communities, as well as workshops and seminars on indigenous issues.

150. The representative from the Mohawk Nation at Kahnawake said that he had always been critical of the International Decade of the World's Indigenous People because very few people knew about it. However, he had been involved in several workshops under the programmes of the Decade. Among others, he had chaired a workshop in New York on indigenous media which was of a very high standard and had excellent attendance. He stated that the developing indigenous media programme was of great use to indigenous peoples.

## VII. OTHER MATTERS

151. A representative of the OHCHR Trust Funds Unit reported on the activities of the Voluntary Fund for Indigenous Populations. The Board of Trustees of the Fund had recommended 79 travel grants for the participation of indigenous representatives at the Working Group and 23 travel grants to attend the seventh session of the working group on the draft United Nations declaration on the rights of indigenous peoples. The grants amounted to a total of US$ 431,900. In addition, the Fund had recommended that sufficient funds (about US$ 38,000) be set aside for grants to allow indigenous representatives to attend, as observers, a possible meeting of the Permanent Forum before the next session of the Board. This, however, called for the adoption of a resolution by the General Assembly which would further extend the mandate of the Fund. It was noted that contributions amounting to US$ 700,000 were necessary to cover the expenditures foreseen for 2002.

152. The representative from DOCIP provided information about its work during the last year which included courses for indigenous peoples, documentation on indigenous peoples, and the production of a CD-Rom containing all the interventions made at the WGIP during the last 20 years. The Chairperson-Rapporteur congratulated warmly Ms. Pierrette Birraux-Ziegler for the valuable contribution that DOCIP has made at the Working Group and thanked DOCIP for the very useful CD-Rom.

## VIII. CLOSING MEETING

153. In her concluding comments, the Chairperson-Rapporteur thanked the members of the Working Group on Indigenous Populations, indigenous participants and observer Governments. She expressed satisfaction with the work achieved during the session, in particular on the principal theme. She noted that more than 1,000 persons had attended the session, confirming its importance as a meeting place for indigenous peoples in the United Nations.

154. Mr. Ted Moses, on behalf of the indigenous delegates, thanked the Chairperson-Rapporteur for her long years of constructive work and invaluable service and outstanding achievements. She had earned the appreciation of indigenous peoples from all over the world. He also thanked her for her numerous visits to indigenous communities which had

allowed her to see their conditions first hand and to provide important information relating to the work of the United Nations system concerning the protection of indigenous rights. He said that indigenous peoples had found a champion in Ms. Daes.

155. At the conclusion of the Working Group, all the participants took part in a ceremony expressing their gratitude and congratulations to Ms. Daes for her invaluable contribution in promoting and protecting the human rights and fundamental freedoms of indigenous peoples, and for her great success in keeping a balance in the constructive relations between indigenous peoples and Governments and for establishing a constructive and democratic dialogue between them.

## IX. CONCLUSIONS AND RECOMMENDATIONS

### A. Review of developments

156. The Working Group reaffirmed its view that the agenda item entitled "Review of developments ..." was a fundamental, constructive and positive part of its mandate. It noted that its sessions remained the only occasion in the United Nations when indigenous peoples, Governments, non-governmental organizations and intergovernmental organizations could provide comprehensive information about current developments. It also stressed its view that the open debate contributed to better understanding and fruitful action.

157. The Working Group expressed its appreciation to all participants and especially those who had travelled at great expense to participate. It welcomed the participation of observer Governments and the detailed information they had provided about current developments.

158. The Working Group expressed its gratitude to ILO, UNESCO, WHO, UNDP, the World Bank and the World Council of Churches for their constructive contributions in the plenary meetings and for the consultations and briefings they had organized as parallel events.

159. The Working Group thanked all participants who had organized parallel events. It considered that the organization of such events enhanced the work of the Working Group.

160. The Working Group welcomed the fruitful discussions that took place under the principal theme "Indigenous peoples and their right to development, including their right to participate in development affecting them", and decided that this principal theme will continue during the twentieth anniversary session in 2002. In this respect, it expressed its gratitude and appreciation to Ambassador Dembri (Algeria) who addressed the Working Group in his capacity as Chairperson-Rapporteur of the Working Group on the Right to Development and provided valuable information relating to the concept of development and the important work accomplished by the Working Group.

161. The Working Group also noted the ongoing efforts of UNDP and the World Bank to draft policy guidelines on indigenous peoples and encouraged both organizations to continue their work in full consultation with indigenous peoples and communities.

162. The Working Group decided to invite Mr. Guissé to prepare a working paper on "Indigenous peoples' right to development and globalization" for its twentieth session in order to stimulate further discussion on this important issue.

163. The Working Group noted that in the year 2002 it would be celebrating its twentieth anniversary and decided to highlight, as the first substantive item, the theme: "The Working Group on Indigenous Populations: achievements at the United Nations system and a vision for the future." In this respect, the Working Group decided to invite the Chairperson-Rapporteur, Ms. Daes, to present a working paper that would reflect upon the achievements accomplished by indigenous peoples at the United Nations and look forward to the challenges of the coming years. It also encouraged OHCHR to consider how it could organize special events, in cooperation with indigenous peoples, Governments, NGOs and the United Nations system, to celebrate the Working Group's twentieth anniversary.

## B. Standard-setting activities

164. The Working Group reaffirmed its view that the agenda item on standard-setting constituted a fundamental part of its mandate, as stipulated in Economic and Social Council resolution 1982/34.

165. The Working Group noted the opinions expressed in relation to private sector energy, mining and natural resource companies and agreed to continue to provide an opportunity under this agenda item for further consideration of this question. In this respect, the Working Group urged Mr. Alfonso Martínez to submit to the Working Group at its twentieth session the working paper on indigenous peoples' relationship with natural resource, energy and mining companies requested in 1997.

166. The Working Group welcomed the decision by OHCHR to organize, in collaboration with ILO, WTO and UNCTAD, a workshop on indigenous peoples, private sector natural resource, energy and mining companies and human rights, and suggested that the Chairperson-Rapporteur be invited to make a contribution on this important and complex subject, along with any other member of the Working Group who wished to do so.

167. The Working Group decided to invite UNDP and the World Bank to present their new policy guidelines on indigenous peoples at its twentieth session so that indigenous peoples and communities could be better informed of initiatives in this area.

168. The Working Group decided to invite Ms. Motoc to prepare a working paper for its twentieth session containing proposals and suggestions for possible future standard-setting that might be undertaken, as well as another working paper on the consequences of biotechnology on indigenous peoples.

169. The Working Group decided to invite Ms. Daes to prepare a working paper on indigenous peoples' permanent sovereignty over natural resources, which is relevant to her study on indigenous peoples and their relationship to their lands (E/CN.4/Sub.2/2001/21).

### C. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

170. The Working Group reiterated its recommendation to the Bureau of the World Conference that representatives of indigenous peoples be given an opportunity to address the plenary, in accordance with paragraph 31 of the Vienna Declaration and Programme of Action of the World Conference on Human Rights.

171. The Working Group noted the inclusion of chapters devoted to indigenous peoples in the draft declaration and programme of action of the World Conference. It urged that the Conference use the term "indigenous peoples" without qualification in order to recognize the collective character of indigenous nations and communities. It also called for a strong statement that would re-invigorate the efforts to finalize the draft United Nations declaration on the rights of indigenous peoples. The Working Group also encouraged Governments to commit themselves to adopting appropriate legislation that would recognize indigenous peoples' rights over lands and resources and their self-governing institutions. It also called for the inclusion of practical and realizable activities within the programme of action that could be undertaken by United Nations agencies.

172. The Working Group welcomed the decision by OHCHR to organize parallel events during the Conference for indigenous peoples, in particular the "Indigenous media dialogue", the "Round table on indigenous issues" and "Voices of indigenous women". It also expressed its deep appreciation to the High Commissioner for ensuring that representatives of indigenous media were invited to the World Conference. Ms. Daes would represent the Working Group at the Conference, to which Mr. Alfonso Martinez had also been invited.

### D. International Decade of the World's Indigenous People

173. The Working Group welcomed the information provided about activities undertaken in the framework of the Decade. In this respect, it congratulated the High Commissioner for organizing, in cooperation with the Working Group on Indigenous Populations and the Working Group on Minorities, the second Workshop on multiculturalism in Africa: peaceful and constructive group accommodation in situations involving minorities and indigenous peoples, in Kidal, Mali, in January 2001.

174. The Working Group encouraged OHCHR to organize other regional seminars and workshops so that indigenous peoples from all areas could have an opportunity to take part in activities in the framework of the Decade.

175. The Working Group noted the establishment by the African Commission on Human and Peoples' Rights of a working group on indigenous peoples and encouraged OHCHR to maintain and deepen its cooperation with the newly established body.

176. The Working Group decided to recommend to OHCHR that it organize a preparatory workshop on implementation of the recommendations relating to indigenous peoples contained in Agenda 21 of the United Nations Conference on Environment and Development.

177. The Working Group expressed its gratitude to members of the Advisory Group for the Voluntary Fund for the International Decade and the donor Governments that had made contributions to the Fund. It noted that the Fund provided support for indigenous projects, international and regional seminars and human rights training for indigenous peoples.

178. The Working Group noted the efforts within the Technical Cooperation Branch of OHCHR to include indigenous components in country programmes. In particular, it welcomed the organization by OHCHR of a training workshop for indigenous peoples on human rights in Oaxaca, Mexico, from 13 to 17 August. The Working Group encouraged OHCHR to continue to consider including indigenous components in its technical cooperation programmes.

## E. Other matters

179. The Working Group expressed its appreciation to the organizers of the second NGO workshop on indigenous children and youth that took place in Geneva on 19 and 20 July 2001.

180. The Working Group expressed its grateful thanks and deep appreciation to the High Commissioner for the efforts she is making to prepare for the first session of the Permanent Forum on Indigenous Issues. In particular, it welcomed the proposals to establish a technical support team to undertake the necessary preparatory work under the auspices of an inter-agency contact group.

181. The Working Group decided to recommend that the Chairperson-Rapporteur , Ms. Daes, present the report on its nineteenth session to the Permanent Forum on Indigenous Issues when it meets in May 2002.

182. The Working Group expressed its deep appreciation to its Chairperson-Rapporteur, for the outstanding work she had done since 1984 to advance the cause of indigenous peoples and for her invaluable personal contribution to the recognition, promotion, protection and implementation of the rights of the world's indigenous peoples.

183. The Working Group decided to consider the following items at its twentieth session: "The Working Group on Indigenous Populations: achievements of indigenous peoples at the United Nations system and a vision for the future"; "Review of developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples: indigenous peoples and their right to development, including participation in development affecting them", "Review of developments: general statements"; "Standard-setting activities"; "Other matters".

## Annex I

## ATTENDANCE

The following 33 States Members of the United Nations were represented by observers: Algeria, Argentina, Australia, Austria, Brazil, Canada, Chile, China, Cyprus, Denmark, Democratic Republic of the Congo, Ecuador, Estonia, Finland, France, Greece, India, Indonesia, Japan, Malaysia, Mauritius, Mexico, Morocco, New Zealand, Philippines, Russian Federation, Spain, Suriname, Sweden, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America.

The following non-member States were represented by observers: Holy See, Switzerland.

The following United Nations bodies and specialized agencies were also represented by observers: United Nations Development Programme, International Labour Office, United Nations Educational, Scientific and Cultural Organization, World Health Organization, World Bank.

The following organization was represented by an observer delegation: World Conservation Union (IUCN).

The following non-governmental organizations in consultative status with the Economic and Social Council were represented by observers:

Aboriginal and Torres Strait Islander Commission, American Indian Law Alliance, Asian Buddhist Conference for Peace, Association of Indigenous Peoples of the North, Siberia and Far East of the Russian Federation (RAIPON), Commission of the Churches on International Affairs of the World Council of Churches, Grand Council of the Crees, Indian Council of South America (CISA), Indian Law Resource Centre, International Federation for the Protection of Ethnic, Religious, Linguistic and Other Minorities, Indian Movement "Tupaj Amaru", International Indian Treaty Council, International Movement Against Discrimination and Racism, International Organization for the Development of Freedom of Education (OIDEL), International Organization of Indigenous Resources Development, International Peace Bureau, Inuit Circumpolar Conference, Juridical Commission for Auto-Development of First Andean Peoples (CAPAJ), International Work Group on Indigenous Affairs (IWGIA), International Service for Human Rights, National Aboriginal and Islander Legal Services, Saami Council, Society for Threatened Peoples, World Organization against Torture, World Wide Fund for Nature International.

The following indigenous peoples' organizations and nations, as well as other organizations and groups, were represented at the eighteenth session and provided information to the Working Group with its consent:

Aboriginal Business Leaders and Entrepreneurs Aconamic, Action d'appui pour la protection des droits de minorités en Afrique centrale, Adivasi Ekta Parishad, African Indigenous and Minority Peoples Organization (AIMPO), African Indigenous Womens

Organization, Aini Peru, Ainu Association of Rera, Aktionsgruppe Indianer & Menschenrechte, Alexis Indian Band, Alifuru Organization, Almaciga (Grupo de Trabajo Intercultural), Amerindian Peoples Association of Guyana, Anipa, Ancap-Tamaynut, Anywaa Survival Organisation, Asia Indigenous Peoples Pact (AIPP), Assembly of First Nations, Asociación Andés, Asociación Indígena Amayra de Achá, Asociación Indígena Aymara San Bartolomé de Livilcar, Asociación Indígena de la República Argentina, Asociación Napguana, Association des chantiers assais, Asociation Indigène de Batwa Republique, Association Isudar, Association nationale pour la communication et l'éducation aux droits de l'homme, Association of Indigenous Peoples in the Ryukyus (AIPR), Association of the Shor People, Association pour la promotion des Batwa rwandais, Association pour la promotion des Batwa (APB), Association Tidawt, Bangladesh Adivasi Forum, Bank Information Center, Bawm Indigenous People's Organization, Bawn Social Council, Black Hills Teton Sioux Nation, Borok People of Twipra, Borok Peoples Human Rights Organisation, Cactus Valley Red Willow Spring Sovereign Community of Big Mountain, Canadian Friends Service Committee, Canadian Indigenous Women's Resource Centre, Capitania Guarani Zona Santa Cruz, Casa Nativa Tampa Allqo, Centre for Organizations Research and Education (CORE), Centro de Investigación para la Paz, Centro Indígena Saraguros de San Vincente de Caney, Chin Indigenous People, Chittagong Hill Tracts Hill People's Church, Chotanagpur Adivasi Sewa Samiti, Conseil national des droits du peuple autochtone en Nouvelle-Calédonie (CNDPA), Coalición Nacional de Mujeres Indígenas, Comité de Solidaridad Triqui, Comité Suisse de soutien aux Chagossiens, Commission amazighe internationale pour le développement et les droits de l'homme, Comunidad Shuar de Namarin, Confederación Nacional de Criadores de Alpaca, Llama y Vicuna, Congrès mondial amazigh, Consejo de Organizaciones Mayas de Guatamala, Consejo de Organizaciones Tukum Umam, Consejo de Pueblos y Organizaciones Indíginas (Ecuador), Consejo Gitano, Consejo Nacional de Mujeres Costarricenses, Consejo Tukum Umam, Contralesa, Coordinadora de las Organizaciones Indígenas de la Cuenca Amazónica (CSIA), Cordillera Peoples Alliance, CSIA-Nitassinan, Cultura de Solidaridad Afroindígena, Daba Lorivhuwa Front, Dabalorivhuwa Patriotic Front, Danzistico Micanchic-Supay, Dapan, Deboin Peoples Foundation, Dene Sulane of Coldlake, Desarrollo Rural Yolchikaualistli, Dorobo Centre for Dorobo Rights, Dorobo People, Dupoto-e-Maa, Eagle Star International, ECDPM, ELS-HAM Papua, EMIROAF - Ethnic Minority Rights Organization of Africa, Empire Washitaw, Ethnica, FEIE, Faira Aboriginal Corporation, Fédération des organisations autochtones de guyane, First Nations Business Training Group (FINBARR), Forest Peoples Programme, Foundation Zio-Ai, Fund of the Seventh Generation, Fundación Kuramai, Fundación Promocion Conocimiento Indigena, Fundación Rhumy Wara, Gambela Peoples Democratic Congress, Grumin, Haudenosaunee, Hawaii Institute of Human Rights, Health Unlimited, Higaonon Peoples, Hill Women's Federation, Hmong International Human Rights Watch, Hojas de Hierba, Human Rights International Alliance, Human Rights Institute, ICRA (International Commission for the Rights of Aboriginal People)-Suisse, IETSSAY, ICN, ICTI Tanimbar, Iloodoariak Community Land and Development Project, Incomindios, Indian Confederation of Indigenous and Tribal People, Indigenous Information Network, Indigenous Peoples of Africa Coordinating Committee (IPACC), Indigenous Tribal Development Centre, Indigenous-Tribal Peoples of the Tropical Forests, Institute for Human Rights Study and Advocacy, Institute for West Papua Indigenous People Study and Empower, Instituto Qheshwa Jujuymanta, International Alliance of Indigenous and Tribal Peoples of the Forest, International Native Tradition Interchange, Jatiya Adiuashi Parishad, Juventud Kuna, Ka Lahui Hawai'i, Kanaky People, Kebager te Ked-Inged, Keiyo Indigenous Community, Khasi Welfare Association, Khoekhoegowas Curriculum Committee,

Kingdom of Islamic Foundation, Kirat Yakthung Chumlung, Komi People Congress, Komi People Revival Committee, Kuki Indigenous People (KIP), KWIA, Lakota Nation, Land is Life, Lao Human Rights Council, L'Auravetlan Foundation (Moscow), Lelio Basso International Foundation, Leonard Pelletier Defense Committee, Loodariak Community Land and Development Programme, Lumad Peoples Movement, Lumbu Indigenous Community Foundation, Maa Development Association, Maasai Women for Education and Economic Development, Maluku Sovereignty Front, Mapuche International Link, Mashantucket Pequot Tribal Nations, Mena Muria Foundation, Metis Nation of Alberta, Metis National Council, Mission mondiale de refuge, Mohawk Nation, Moluccan Sovereignty Front, Mugarik Gabe, Mujer Kichin Konojel, Naga Peoples Movement for Human Rights, Nagatira Lands Trust Aotearoa, Na Koa Ikaika O Ka Lahui Hawaii, National Adivasi Council, National Khoisan Consultative Council of South Africa, Nepal Federation of Nationalities, Netherlands Centre for Indigenous Peoples, New Humanity, Ocaproce International, Ogiek Rural Integral Projects (ORIP), Oraon People, Organización Nacional Indígena de Colombia (OINC), Organización de la Nacion Aymara, Organisation for Survival of l-Laikipiak - Indigenous Maasai Group Initiatives (OSILIGI), Pacos Trust, Pagkakaisa Ng Aeta Ng Pinatubo, Inc., Parakuiyo Community, Parbatya Bouddha Mission, Parbatya Chattagram Jana Samhati Samiti, Pauktuutit Inuit Women's Association, Peace 2000, Philippines Indigenous Peoples Link, Programme d'intégration et de développement du peuple pygmée au Kivu, PREDO, PRODECAP (Brazil), Pueblo Quechua, Ramflems ent., Rehab Hope Fund, Inc., Rehoboth Baster, Sarawak Peoples Campaign, Sedac Jóvenes, Sengwer Indigenous Development Project, Servicios para el Desarrollo, Shakyamuni Bouddha Vihara, Shimin Gaikou Centre, Silangwa Youth Group, SIMOO, Siocon Subanon Association, Solidarité avec les peuples autochtones d'Amérique (Nord, Centre et Sud) (SOPAM), South Africa Goring Haicona, St. John's Mission, Bijni, Survie Touaregue-Temoust, Taliate Abanesse, Tallér de Historia Oral Andina, Taller Laboral Cerrochomio, Tamaynut, Tebtebba Foundation, Teton Sioux Nation Treaty Council, Tidawt, Tin Hinan, Tomwo Integrated Pastoralists Development Initiatives, Torres Strait Regional Authority Australia, Tribal Women's Artists Cooperative, Tsou National Council, UNESCO Centre of Catalonia, UNESCO Extea Unissons-nous pour la promotion des Batwa (UNIPROBA), Waso Trustland Project, Working Group of Indigenous Minorities in Southern Africa (WIMSA), Working Circle Indians Today, World Adivasi Council (WAC), World Coalition for Indigenous Children and Youth, World Sindhi Congress (BRAD), Yurrogonendi First Nations Centre, Zio-ai Foundation, Zo Re-Unification Organisation.

In addition to the above-mentioned participants, a number of individual scholars, human rights experts, human rights defenders and observers attended the meetings:

Aarhus University, Agadez (Niger), Arbeitskreis Tourismus und Entwicklung, Basque Government, Bilbao Etxezabal, CEFAIL, Canadian International Development Agency, Canisius College, Centre National de la Recherche Scientifique, Centro de Investigación Para la Paz (CIP), Children on the Earth Event, Chuo University, CISCO, Dioleg Entre Cultures, Dodos EGG, ECDPM, Hawaii Institute of Human Rights, Health Development, IUED, Institut für Ökologie und Aktions - Ethnologie, Institute for Ecology and Action Anthropology, ISIA, Jharkhand State (India), Kisik Marketing, La Causa dei Popoli, L'École de Lausanne, Monkey's Dream, Narada (Germany), Nederlands Centrum voor Inheemse Volken, Paroa School, Rio Tinto, Sarini, Childrens Project, St. John's Mission-Bijni, Taneatua School,

The Revolutionary Committees Movement, Association pour le développement, TIGMI, Universidad Nacional de Educación a Distancia, University Institute of Studies and Development, University of Amsterdam, University of Barcelona, University of Berlin, University of Berne, University of Cergy-Pontoise, University of Copenhagen, University of Deusto, University of Dijon, University of Essex, University of Geneva, University of Keele, University of Madrid, , University of Marseille, University of Nantes, University of Neuchatel, University of Norway, University of Notre-Dame de la Paix, University of Oslo, University of Oxford, University of San Paulo, University of Strasbourg, University of Valencia, United Nations Voluntary Fund for Indigenous Populations, Yankuikaahuak.

## Annex II

## LIST OF DOCUMENTS

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|---|---|
| Provisional agenda | E/CN.4/Sub.2/AC.4/2001/1 and Rev.1 |
| Annotations to the provisional agenda | E/CN.4/Sub.2/AC.4/2001/1/Add.1 |
| Note by the secretariat: Principle theme: Indigenous peoples and their right to development | E/CN.4/Sub.2/AC.4/2001/2 |
| Workshop on indigenous media: "Promoting the rights of indigenous peoples through the media" | E/CN.4/Sub.2/AC.4/2001/3 |
| Voluntary Fund for Indigenous Populations: note by the secretariat | E/CN.4/Sub.2/AC.4/2001/4 |
| International Decade of the World's Indigenous People; Voluntary Fund for the International Decade of the World's Indigenous People: Note by the secretariat | E/CN.4/Sub.2/AC.4/2001/5 |
| Indigenous peoples and their relationship to land; final working paper prepared by the Special Rapporteur, Ms. Erica-Irene A. Daes | E/CN.4/Sub.2/2001/21 |

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